Finding "East"/"West" Divisions in Council of Europe States on Treatment of Sexual Minorities: The Response of the Strasbourg Court and the Role of Consensus Analysis[1]

Professor Helen Fenwick

Professor of Law, Durham University

Dr Daniel Fenwick

Lecturer in Law, Northumbria University

keywords to be inserted by the indexer

Abstract

Manifestations of prejudice against sexual minorities are currently especially resurgent in certain "Eastern" Council of Europe Member States. This article argues that the current approach at the Strasbourg Court in this context shows tensions between two conflicting demands: it is seeking both to protect sexual minorities, but also its own authority, by relying on the consensus doctrine to avoid determinations likely to lead to open conflict with such states. In respect of homophobic hate crimes and bans on public manifestations of support for sexual minorities, the Court has shown a robust determination to provide protection for such minorities, partly on the basis that there is no consensus among the Member State supporting such practices. But, in strong contrast, in the context of formalisations of same-sex relationships, there are signs that "East"/"West" divisions are having some inhibitory impact on its judgments, accommodated mainly via consensus analysis. This article therefore considers ways of reconciling the two apparently conflicting aims of the Court identified.

(1) Introduction

The Strasbourg Court has a long history of defending the interests of sexual minorities[2] under the ECHR, and can be credited, as is well-documented, with a number of legal changes recognising various aspects of such interests.[3] But recently claims of a range of very serious violations of the ECHR arising from manifestations of prejudice against such minorities, especially in certain Member States within the group that may be termed "Eastern",[4] have arisen. Those manifestations appear to be *escalating* in terms of

[1] The authors acknowledge with thanks the comments of the reviewers.

[2] This term will be used throughout this article to refer to challenges at Strasbourg where the fact that the applicant is part of, or a supporter of, a sexual minority, or perceived to be, is a significant factor bearing on the factual situation giving rise to the challenge. While it is clearly the case that prejudice is experienced by members of the trans-communities, this article is not concerned specifically with the Strasbourg transgender jurisprudence.

[3] See P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013), Ch.2; *Dudgeon v United Kingdom* (1980) 3 E.H.R.R. 40; *Norris v Ireland* (1988) 13 E.H.R.R. 186; *Smith v United Kingdom* (2001) 31 E.H.R.R. 24.

[4] The term "Eastern" Member States of the Council of Europe will be taken to include: Albania, Bulgaria, Croatia, Poland, Hungary, Moldova, Macedonia, Greece, Cyprus, the Czech Republic, Kosovo, Montenegro, the Slovak Republic, Slovenia, Romania, Serbia, Bosnia and Hercegovina, Estonia, Latvia, Lithuania, Georgia, Azerbaijan, Armenia, Russia, Ukraine, Turkey. Certain of these states have territory beyond Europe's generally accepted Eastern border (the Volga River and Ural mountains): Turkey and Russia have territory that spans the border, while Armenia, Azerbaijan and Georgia are beyond it, though they are considered "politically European" by the Parliamentary Assembly of the Council of Europe: "Situation in

seriousness, as documented in a recommendation and subsequent resolution of the Parliamentary Assembly of the Council of Europe,[5] and in recent reports on the rights of sexual minorities in Europe.[6] So the movement towards the acceptance of such rights in many Member States, in some instances prompted by Strasbourg decisions, seems at present to be in reverse in some more socially conservative "Eastern" states, most notably Moldova, Ukraine, Russia, Turkey, Georgia, Azerbaijan, and Armenia. That phenomenon appears to be attributable largely to the recent resurgence of nationalism and populism in such states, taking the form of anti-Western sentiment.[7] In those "Eastern" states that are most culturally distant from "Western" values, and most determined at present to increase that distance, refusal to countenance manifestations of the life-styles of sexual minorities has become a key totemic feature distinguishing their own cultures from Western ones.[8] Thus, persons deemed to be of "non-traditional" sexual orientation[9] in a number of culturally anti-Western contracting states face a lived reality within which socially accepted prejudice against sexual minorities, disregarded, condoned, facilitated or promoted by state sources, is endemic.[10] Nevertheless, as this article makes clear, especially in Section 5, a straightforward East/West divide in this context is not postulated; some "Western" states, even very recently, are far from immune from evincing prejudice against such minorities.

One result of this situation, especially in certain "Eastern" Member States, is that a number of cases linked to prejudice against sexual minorities have recently made their way to Strasbourg, falling into the three categories identified below. The three have in common claims based on clear instances of such prejudice inherent in the factual situations, but the response of Strasbourg in the first two can valuably be compared with its response in the third, in order to illustrate the contentions made below as to the role of the consensus doctrine in the recent Strasbourg sexual orientation jurisprudence. In the first one identified the applicants alleged a lack of protection from hate crimes or hate speech based on sexual orientation

Kazakhstan and its Relations with the Council of Europe" (7 July 2006, Doc.11007), *https://www.refworld.org/docid/44c4bb5c4.html* [Accessed 23 May 2019], paras 62–63. There is no clear consensus as to the states that make up Central and Eastern Europe, but for convenience the term "Eastern" will be used to refer to all these Member States. The "Western" Member States of the Council of Europe will be taken to include: Portugal, Spain, Ireland, UK, France, Switzerland, Belgium, Netherlands, Luxembourg Monaco, Andorra, Italy, Austria, Germany, Malta, Denmark, Norway, Sweden, Finland, Iceland, San Marino.

[5] The Parliamentary Assembly expressed "deep concern at the repeated infringement, in some Council of Europe Member States, of the rights of freedom of assembly and freedom of expression in relation to LGBT persons' human rights" related to "homosexual propaganda" laws: Recommendation 2021(2013), para.3 and Resolution 1948(2013). See also Council of Ministers Recommendation CM/Rec(2010)5. See further T. Hammarberg, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe*, 2nd edn (Council of Europe, 2011) ("Hammarberg, Discrimination on grounds of SOGI in Europe").

[6] See, e.g. Amnesty International, "Former Soviet states entrenching homophobia and demoralizing LGBTI rights activists" (22 December 2017), *https://www.amnesty.org/en/latest/news/2017/12/former-soviet-states-entrenching-homophobia-and-demoralizing-lgbti-rights-activists/* [Accessed 23 May 2019]; see further ILGA-Europe, "Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2019" (2019), *https://www.ilga-europe.org/annualreview/2019* [Accessed 23 May 2019] ("ILGA-Europe, Annual Review 2019").

[7] See Pew Research Center, "Eastern and Western Europeans Differ on Importance of Religion, views of minorities and Key Social issues" (29 October 2018), *http://www.pewforum.org/2018/10/29/eastern-and-western-europeans-differ-on-importance-of-religion-views-of-minorities-and-key-social-issues/* [Accessed 23 May 2019], p.12. See also fn.35 below.

[8] See, e.g. Article 19, "Challenging hate: Monitoring anti-LGBT 'hate speech' and responses to it in Belarus, Kyrgyzstan, Moldova, Russia and Ukraine" (2018), *https://www.article19.org/wp-content/uploads/2018/03/LGBT-Hate-Speech-Report-Central-Asia_March2018.pdf* [Accessed 23 May 2019] pp.52–56, 73–66 ("Article 19, Challenging hate"); S. Habdank-Kołaczkowska et al., "Nations in Transit 2014: Eurasia's Rupture with Democracy" (Freedomhouse, 2014), *https://freedomhouse.org/sites/default/files/NIT2014%20booklet_WEBSITE.pdf* [Accessed 23 May 2019], pp.1–2.

[9] See Article 19, Challenging hate (2018), pp.5, 73. The term "non-traditional sexual orientation" was used by the Russian state in defending the challenge considered below in *Bayev v Russia* (App. No.67667/09), judgment of 20 June 2017 at [3].

[10] This refers in particular to Azerbaijan, Turkey, Georgia, Armenia, Ukraine, Russia, Moldova. This list is based on reports such as those by the Pew Research Center as to social perceptions of sexual minorities in those states: Pew Research Center, "Religious Belief and National Belonging in Central and Eastern Europe" (May 2017), *http://assets.pewresearch.org/wp-content/uploads/sites/11/2017/05/15120244/CEUP-FULL-REPORT.pdf* [Accessed 23 MAy 2019], p.27. See also Section 2 below and ILGA, Annual Review 2019, chapter on United Nations, and country reports for Azerbaijan, Armenia, Russia, Turkey, Ukraine, Moldova, Georgia. In these states, homosexuality is legal but there are either no legal protections for members of the LGBTI community or few protections. See also fn.23 below. This list is clearly contentious—e.g. the European Agency for Fundamental Rights survey of LGBT discrimination found that over a third of LGBT individuals in Cyprus, Croatia, Poland, Lithuania and Bulgaria were not open about their sexuality due to fear of violence or harassment: "Survey on fundamental rights of lesbian, gay, bisexual and transgender people in EU" (2012), *https://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-fundamental-rights-lesbian-gay-bisexual-and* [Accessed 18 April 2019]. The High Commissioner of Human Rights for the Council of Europe reported on surveys in Bosnia and Herzegovina, Serbia and Lithuania that found that substantial sections of the population of these countries perceived "LGB persons as being an anomaly and as such a threat to society": "Discrimination on grounds of sexual orientation and gender identity in Europe" (Hammarberg, Discrimination on grounds of SOGI in Europe, section 1.3); see also Pew Research Center, "Global Acceptance of Homosexuality" (3 June 2013), *http://www.pewglobal.org/2013/06/04/global-acceptance-of-homosexuality/* [Accessed 23 May 2019].

perpetrated by non-state actors, and of resultant homophobically-linked adverse treatment by state actors. In the second, ECHR violations were alleged due to *direct* state-based attempts to silence pro-LGBT expression, while the third concerns the efforts of same-sex couples to access state benefits and formal legal recognition of their relationships via Strasbourg claims for same-sex registered partnerships and same-sex marriage. While these categories are distinct, the indications of state-condoned prejudice underlying them in certain "Eastern" states appear to share the common goal of erasing manifestations of sexual minority life-styles from the public space, in a manner, it is suggested, chillingly reminiscent at its most extreme of early-stage anti-semitic policies pursued by Nazi Germany.[11]

It might be thought that this was precisely the type of situation that the Court was set up to address. However, its reliance on the consensus doctrine,[12] it will be argued, has had some inhibiting impact on its response in the context of the third category of cases. In general, in the Court's jurisprudence *lack* of consensus among the Member States means that the margin of appreciation widens, as an aspect of the subsidiarity principle,[13] so the scope of the right in question is narrowly interpreted.[14] Or the justification put forward for discrimination under art.14,[15] or for failing to introduce a rights-protecting measure, is not closely scrutinised.[16] In that third category, therefore, since no consensus among the Member States on same-sex marriage is currently available, the margin conceded to a particular state is wide.[17] But, conversely, if a strong consensus is identified, as in the first two categories of cases to be considered, a narrow or no margin will be conceded to the state in question, which is not aligned with the majority.[18] Thus its role in

[11] This refers to the early policies of segregation and discrimination enacted by the Hitler government on seizing power, not to the final solution. The assertion is made partly in the sense that homosexuals may be seen as a "threat from outside"; see the discussion of the attacks on homosexuals in Chechnya, below, and see Laurie Essig "'Bury Their Hearts': Some Thoughts on the Specter of Homosexuality Haunting Russia" (2014) 1(3) *QED: A Journal in GLBTQ Worldmaking* 39. See further P.G. Lauren, *The Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2003), pp.126–134.

[12] That is often taken to denote identifying common ground between the laws of a majority of Member States in relation to the domestic protection for particular rights; it can also refer to a *trend* towards occupying such ground. For examination of the use of the consensus doctrine at Strasbourg, see L. Wildhaber, A. Hjartarson and S. Donnelly, "No Consensus on Consensus? The Practice of the European Court of Human Rights" (2013) 33 *Human Rights Law Journal* 248; M. Arden, *Human Rights and European Law: Building new legal orders* (Oxford: OUP, 2015), pp.313–315; K. Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534.

[13] See the emphasis on subsidiarity and the margin of appreciation in the Interlaken (2010), Izmir (2011), Brighton (2012), Brussels (2015), Copenhagen (2018) declarations: High Level Conference on the Future of the European Court of Human Rights, Copenhagen Declaration, 13 April 2018, *https://rm.coe.int/copenhagen-declaration/16807b915c* [Accessed 23 May 2019]. Both doctrines would be expected to be emphasised more strongly in the Court's judgments when Protocol 15 comes into force: Council of Europe, "Explanatory Report on Protocol 15" (C.E.T.S. No. 213.), *www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf* [Accessed 23 May 2019], para.9. It is awaiting ratification by four states. See further: E. Bates, "The UK and Strasbourg: A Strained Relationship—The Long View" and H. Fenwick, "Protocol 15, enhanced subsidiarity and a dialogic approach, or appeasement in recent cases at Strasbourg against the UK", in Ziegler et al. (eds), *The UK and European Human Rights—A Strained Relationship* (London: Hart, 2015); D. McGoldrick, "A defence of the margin of appreciation and an argument for its application by the Human Rights Committee" (2016) 65(1) I.C.L.Q. 21. For criticism of the margin of appreciation doctrine, see e.g. P. Laverack, "The indignity of exclusion: LGBT rights, human dignity and the living tree of human rights" (2019) 2 E.H.R.L.R. 172, 182.

[14] Thus, in considering the ambit of the substantive rights any consensus will also be taken into account in determining whether a state which has not provided domestic protection answering to the potential obligation in question has or has not over-stepped its margin of appreciation. See: *Schalk and Kopf v Austria* (2011) 53 E.H.R.R. 20 at [58]; work referenced in fn.18 below; and D. McGoldrick, "A defence of the margin of appreciation and an argument for its application by the Human Rights Committee" (2016) 65(1) I.C.L.Q. 21, 28.

[15] In general, if discrimination on particular protected grounds, including sexual orientation, is alleged under art.14 of the ECHR, the scrutiny accorded to the state's justification will be strict *unless* no consensus on the matter is apparent among the Member States. See *Abdulaziz v United Kingdom* (1985) 7 E.H.R.R. 471 at [90]–[91]; *DH v Czech Republic* (2008) 47 E.H.R.R. 3 at [196]; *EB v France* (2008) 47 E.H.R.R. 21 at [93]; see also in particular Section 5 below.

[16] Thus, the demands of proportionality would be much more readily satisfied. See, e.g. *Rees v United Kingdom* (1987) 9 E.H.R.R. 56 at [37]; *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622 at [234]; *Evans v United Kingdom* (2007) 43 E.H.R.R. 21 at [77]; *Fretté v France* (2004) 38 E.H.R.R. 21 at [41]; *ABC v Ireland* (2011) 53 E.H.R.R. 13 at [232]. In the sexual minority context, see e.g. *Tomás v Spain* (2017) 65 E.H.R.R. 24 and Section 5 below.

[17] That is currently the case in respect of same-sex marriage: a majority of Member States have not introduced such marriage and therefore the Court has not recognised it under art.12: see fn.134 below and in particular re *Oliari v Italy* (2015) 65 E.H.R.R. 957; see also P. Johnson, "Same Sex Marriage and article 12 of the European Convention on Human Rights", in C. Ashford and A. Maine (eds), *Research Handbook on Gender, Sexuality and the Law* (Cheltenham: Edward Elgar Publishing, 2019).

[18] See discussion of the effects of the consensus doctrine in Sections 3, 4 and 6 below, and as to the Court's general stance, e.g. *Goodwin v United Kingdom* (1996) 22 E.H.R.R. 123 at [103]; *Bayatyan v Armenia* (2012) 54 E.H.R.R. 15 at [108]; but cf. *ABC v Ireland* (2011) 53 E.H.R.R. 13 at [237] in the abortion context. For discussion of the margin of appreciation doctrine, see A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: OUP, 2012); E. Bates, "The UK and Strasbourg: A Strained Relationship—The Long View"; and H. Fenwick, "Protocol 15, enhanced subsidiarity and a dialogic approach, or appeasement in recent cases at Strasbourg against the UK", in Ziegler et al. (eds), *The UK and European Human Rights—A Strained Relationship* (London: Hart, 2015).

providing protection for sexual minorities in the third category of cases contrasts strongly with its role in the other two categories.

In order to begin to explore the interplay between Strasbourg protection for the interests of sexual minorities and its reliance on the consensus doctrine, this article begins in Section 2 by identifying and examining manifestations of prejudice against sexual minorities in the more socially conservative "Eastern" Member States. The stances taken by such states could obviously influence Strasbourg consensus analysis, and could also have an inhibiting impact on the Court's activism in this context, on policy grounds, given that it is seeking to avoid judgments that may be greeted with hostility and disregarded by some Member States.[19] This article proceeds in Sections 3, 4 and 5 to consider the impact of consensus analysis in the three categories of cases identified above. Taking account of tendencies towards "East"/"West" divisions among the Contracting States in terms of the protection of the interests of sexual minorities, it will be argued in Section 6 that such analysis, when combined with certain policy considerations, can act as a double-edged sword in that it can both promote and retard acceptance of such interests within the ECHR framework. The consensus device can aid in combatting prejudice against sexual minorities, especially pertinent in states where the majority exhibits such prejudice, but where such populist stances are apparent in a *majority* of Contracting States, the role of the Court in deploying the ECHR as an engine for reform is muted.[20] Its resultant cautious stance on the issue of formalisation of same-sex unions, and in particular as to same-sex marriage, is compared at certain points with the bolder approach of the Inter-American Court of Human Rights (IACtHR) and of the ECJ. Conclusions are then reached as to reconciling tensions between the two conflicting demands of protecting sexual minorities, but also the Court's own authority, in the context of promoting such formalisations.

(2) "East"/"West" divisions as to protections for sexual minorities?

Certain "Eastern" states were identified in the Introduction as the states in which opposition to protecting the interests of sexual minorities is most firmly entrenched,[21] although some very recent, hesitant and precarious signs of liberalism are apparent in those states.[22] Persons deemed to be of a "non-traditional" sexual orientation in such states face a situation within which socially accepted—and state-condoned—prejudice tends to be widespread,[23] sometimes resulting in their intimidation and harassment by state actors. Such states also tend to provide no or little legal protection for sexual minorities subject to homophobic/biphobic violence and harassment by non-state actors, as explored in Section 3,

[19] See in particular fn.166 below.

[20] An exception, as one of the authors noted in 2016 (H. Fenwick, "Same sex unions at the Strasbourg Court in a divided Europe: calling the legitimacy of the Court into question?" (2016) 3 E.H.R.L.R. 249) arose in *Hirst v UK (No.2)* (2006) 42 E.H.R.R. 41, in the context of prisoner voting rights, but it is out of line with the reliance on the consensus doctrine in the Court's jurisprudence generally, especially more recently.

[21] Moldova, Ukraine, Russia, Turkey, Georgia, Azerbaijan and Armenia.

[22] See ILGA-Europe, Annual Review 2019. For example in Armenia, the recently elected Prime Minister, Nikol Pashinyan, is widely viewed to be supportive of human rights, although in official statements he is neutral on the issue of the rights of sexual minorities: see, e.g. S. Morgan, "Pashinyan: the Providential Man to solve Armenia's problems?" (18 December 2018), *https://www.euractiv.com/section/armenia/news/pashinyan-the-providential-man-for-solving-armenias-problems/* [Accessed 23 May 2019]. In the Ukraine, ILGA reports a degree of official and legislative change since 2015, including legislation banning workplace discrimination (see ILGA-Europe, "Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2018" (2018), *https://www.ilga-europe.org/sites/default/files/2018/full_annual_review.pdf* [Accessed 23 May 2019], p.128 ("ILGA-Europe, Annual Review 2018").

[23] See ILGA-Europe, Annual Review 2019. In relation to Russia the Russian Public Opinion Research Centre (VCIOM) found that 55% of Russians polled supported the openly homophobic leader of the Chechen republic, Ramzan Kadyrov, who has actively persecuted sexual minorities in Chechnya: A. Knight, "Russia actively encourages anti-gay stance of Chechen puppet government" (12 June 2017), *https://www.afr.com/news/world/europe/russia-actively-encourages-antigay-stance-of-chechen-puppet-government-20170612-gwp553* [Accessed 23 May 2019]. In relation to Turkey, see e.g. the 2010–14 World Values Survey, in which 85.4% of Turkish respondents stated that they did not want to live with LGBT neighbours (see R. Inglehart et al. (eds), "World Values Survey: Round Six—Country-Pooled Datafile" (JD Systems Institute, 2014), *http://www.worldvaluessurvey.org/WVSDocumentationWV6.jsp* [Accessed 23 May 2019]). In relation to Armenia, see e.g. Pink Armenia, "Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Armenia: A Shadow Report" (105th Session of the UN Human Rights Committee July 2012, Geneva), *http://www.pinkarmenia.org/publication/Armenia%20LGBT_ICCPR_2012_en.pdf* [Accessed 23 May 2019]. In relation to Azerbaijan, see e.g. M. Meaker, "Azerbaijan worst place to be gay in Europe, finds LGBTI index" (10 May 2016), The Guardian, *https://www.theguardian.com/world/2016/may/10/azerbaijan-worst-place-in-europe-to-be-gay-lgbt-rainbow-index* [Accessed 23 May 2019].

even including "honour" murder.[24] Attempts at outward public displays of support for sexual minorities, including Pride parades, are banned in certain of these states, as discussed further in Section 4, while in others, if demonstrations do occur they are often met with violence from non-state actors (see Section 3).[25]

The positions in the Member States as to formalisation of relationship statuses via the introduction of same-sex marriage and/or registered partnerships, discussed in Section 5, unsurprisingly reflects their positions as to rejection or acceptance of prejudice against sexual minorities more generally, as research in this area suggests.[26] In certain states, or parts of them, same-sex couples are very likely to prefer not to live openly as a couple (partly because that would disclose their sexuality), but as apparent flat-mates or merely as friends, due to the hostility and intimidation they would otherwise tend to face.[27] So those Member States most opposed to the introduction of same-sex marriage or registered partnerships also tend to be those in which state agents are themselves sometimes involved in arrests or violence against persons on grounds of sexual orientation.[28] Nonetheless, it is not argued that a *complete* correlation between a lack of any means of formalising same-sex relationships in a state, and other manifestations of prejudice against sexual minorities, is apparent. In certain states which *have* introduced same-sex registered partnership schemes, partly in order to aid applications to join the EU, such manifestations are nevertheless readily apparent and reportedly did not necessarily diminish after they became EU members.[29] However, there appears to be—as one would expect—correlation between a refusal in a particular state to introduce such schemes and the likelihood of occurrence of a range of other manifestations of prejudice against sexual minorities, although the stance of a number of "Eastern" states towards minority sexual orientations, and same-sex couples, is, clearly, far from uniform in accordance with their differing cultural and religious

[24] See in relation to legal protections in "Eastern" states: ILGA-Europe, "Rainbow Europe Index 2018" (2018), *https://www.ilga-europe.org/resources/rainbow-europe/rainbow-europe-2018* [Accessed 15 April 2019]. See in relation to "honour murder" the example of Babi Badalov, a gay Azerbaijani artist who was given asylum in France because of such a threat on grounds of his sexual orientation in his home country: P. Canning, "Gay Azerbaijani artist rejected by the UK wins asylum in France" (7 April 2011), *http://madikazemi.blogspot.com/2011/04/gay-azerbaijani-artist-rejected-by-uk.html* [Accessed 23 May 2019]. See further on the issue of honour killings and asylum, e.g. C. Steinke, "Male asylum applicants who fear becoming the victims of honour killings: the case for gender equality" (2013) 17 *Cuny Law Review* 233.

[25] For example, in Turkey ILGA reported in 2019 that "[the Istanbul Pride] march was banned for the fourth time in a row. Police forces attacked demonstrators in different districts of Istanbul, with plastic bullets and tear gas. 11 demonstrators were taken into custody, and later released …", ILGA-Europe, Annual Review 2019, Turkey country report; see also ILGA-Europe, Annual Review 2018, p.126. See further generally in relation to freedom of assembly and the rights of sexual minorities: ILGA-Europe, Annual Review 2019, country reports for Russia, Turkey, Ukraine, Moldova, Georgia; Hammarberg, Discrimination on grounds of SOGI in Europe, pp.73–81; R. Holzhacker, "State-Sponsored Homophobia and the Denial of the Right of Assembly in Central and Eastern Europe: The 'Boomerang' and the 'Ricochet' between European Organizations and Civil Society to Uphold Human Rights" (2013) 35(1) *Law & Policy* 1.

[26] See Pew Research Center, "Religious Belief and National Belonging in Central and Eastern Europe" (May 2017), *http://assets.pewresearch.org/wp-content/uploads/sites/11/2017/05/15120244/CEUP-FULL-REPORT.pdf* [Accessed 23 May 2019], pp.27–28; ILGA-Europe, "Rainbow Europe Index 2018"*https://www.ilga-europe.org/resources/rainbow-europe/rainbow-europe-2018* [Accessed 15 April 2019]; Caucasus Research Resource Center, "Attitudes towards Homosexuality in the South Caucasus" (14 July 2013), *http://crrc-caucasus.blogspot.com/2013/07/attitudes-towards-homosexuality-in.html* [Accessed 23 May 2019]. The Pew Research Center found in 2013 that 92% of the Muslim population in Azerbaijan viewed homosexual behaviour to be "morally wrong" ("The world's Muslims: religion, politics and society" (30 April 2013), *http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-morality/* [Accessed 23 May 2019], Ch.3.

[27] See, e.g. I. Kochetkov and X. Kirichenko, "Situation of lesbians, gays, bisexuals and transgenders in the Russian Federation" (Moscow Helsinki Group, 2008), *https://www.ilga-europe.org/sites/default/files/Attachments/russia_report_2010.pdf* [Accessed 23 May 2019], p.29. Only 16% of Russian respondents considered that homosexuality should be accepted by society in a 2013 survey conducted by the Pew Research Center: "Global Acceptance of Homosexuality" (3 June 2013), *http://www.pewglobal.org/2013/06/04/global-acceptance-of-homosexuality/* [Accessed 23 May 2019].

[28] For example, Russia is opposed to any formalisation of same-sex unions and also there are a number of pending applications at Strasbourg against Russia concerning the operation of the Russian Foreign Agents Act 2012 against NGOs active in the field of the protection of sexual minorities: *ECODEFENCE v Russia* (App. No.9988/13), communicated 22 March 2017. Dozens of gay men and women were reportedly detained and tortured, even murdered, in Chechnya, a mainly Muslim republic in southern Russia, in March–May 2017, and the "anti-gay purge" was encouraged by Chechnya's highest officials who are on the record as making "abhorrent statements about LGBT people" (see Human Rights Watch, "World Report: Russia" (2018), *https://www.hrw.org/world-report/2018/country-chapters/russia#e81181* [Accessed 17 April 2019]); it found "From late February and through early April, security officials unlawfully rounded up dozens of men they believed were gay, searched their cell phones for contacts of other presumably gay men, and tried to coerce them, including through torture, into naming gay acquaintances." See also Human Rights Watch, "Licence to Harm: Violence and Harassment against LGBT People and Activists in Russia" (15 December 2014), *www.hrw.org/report/2014/12/15/license-harm/violence-and-harassment-against-lgbt-people-and-activists-russia* [Accessed 23 May 2019]. See in relation to Azerbaijan: Human Rights Watch, "Azerbaijan: Anti-Gay Crackdown" (2017), *www.hrw.org/news/2017/10/03/azerbaijan-anti-gay-crackdown* [Accessed 23 May 2019] concerning the campaign of arrest and torturing of men presumed to be gay or bisexual; S. Ismayilov, "LGBT people in Azerbaijan are being rounded up. No wonder they're fleeing" (29 September 2017), *The Guardian*, *https://www.theguardian.com/commentisfree/2017/sep/29/lgbtq-azerbaijan-fleeing-police-raids-arrests-government-hiv* [Accessed 23 May 2019].

[29] C. O'Dwyer, "After Entry into the EU Homophobia was Let Loose" (2010), *Baltic Worlds*, *http://balticworlds.com/after-entry-into-the-eu-homophobia-was-let-loose* [Accessed 23 May 2019].

traditions.[30] In some such states action to combat discrimination based on minority sexual orientations is currently evident, bolstered by findings from the Council of Europe, from the UN Human Rights Council, or from activist LGBT and human rights groups,[31] and by the need to deepen ties with the EU.[32]

Anti-Western sentiment appears to represent a driving force in certain "Eastern" states. Russia's concern in particular to protect its reputation among post-Soviet states as a strong regional actor is based on non-adherence to Western, rather than Russian, moral values,[33] and appears to be linked to an insular concern to maintain the purported strength and stability of the Putin regime by attacking sexual minorities who can be portrayed as threatening outsiders.[34] Similarly, refusals by some other "Eastern" states to accept any formalisation of same-sex unions, and other manifestations of prejudice based on sexual orientation, are, it is argued, due to acquiescence in such prejudice in public life, due to its emphatic (if not always publicly admitted) embrace of "traditional" national, cultural and religious notions of the "family" as representing a key aspect of rejecting "Western" European values.[35] In such states those stances may take the form of failing to provide protection against homophobic hate crimes and threats, as discussed in the following section.

(3) Hatred on grounds of sexual orientation: the state's response

Homophobia from non-state and state actors in detention

Given its absolute nature, and the forms of ill-treatment it proscribes, the most weighty, significant provision of the ECHR is clearly art.3. Until recently it had not been found to apply in respect of degrading treatment, such as abuse and intimidation, suffered by sexual minorities within which state agents were complicit or implicated.[36] However, racially degrading treatment has long been recognised as capable of giving rise to a violation of the article,[37] and the Court, for the first time, found a breach due to ill-treatment having a

[30] See M. Jagielski, "Eastern European Countries, from penalisation to Cohabitation and further?", in K. Boele-Woelki and A. Fuchs (eds), *Legal Recognition of Same Sex Couples in Europe: National, Cross-border and European Perspective* (Cambridge: Intersentia, 2012).

[31] See, e.g. UN Human Rights Office Report, "Discrimination and violence against individuals based on their sexual orientation and gender identity" (A/HRC/29/23, 2015), *www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_23_en.doc* [Accessed 17 April 2019]; T. Hammarberg, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe*, 2nd edn (Council of Europe, 2011), Ch.1.

[32] During the period when states are seeking to join the EU (which to date have included as "Eastern" state candidates who were successful in doing so: Hungary, Estonia, Latvia, Romania, Poland, Lithuania, the Czech Republic, the Slovak Republic), they have to show adherence to the so-called Copenhagen criteria: European Commission, "Conditions for membership" (2016), *http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm* [Accessed 23 May 2019]. Laid down at the June 1993 European Council in Copenhagen, Denmark, membership requires that the candidate country inter alia shows respect for human rights, and protection of minorities. For example, Albania was confirmed as a candidate in June 2014; a European Commission Progress Report ("Albania 2018 Report" (SWD(2018))151 (April 2018), *https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf* [Accessed 17 April 2019], p.48) found that some steps had been taken to improve the legal recognition of the rights of lesbian, gay, bisexual, transgender and intersex persons. If candidates for EU membership fail to attain a certain level of protection for such rights, their path towards membership will be blocked, as occurred when Ukraine's Parliament failed to pass a Bill in November 2015 providing inter alia protection against sexually oriented discrimination in employment, intended to aid in enabling EU membership: see M. Tucker, "Anti-gay vote dashes Ukraine's EU hopes" (12 November 2015), *The Times*, *www.thetimes.co.uk/article/anti-gay-vote-dashes-ukraines-eu-hopes-gkmc7zqtc08* [Accessed 23 May 2019].

[33] S. Rainsford, "Does Putin's Russia reject the West?" (15 March 2018), *BBC News*, *https://www.bbc.co.uk/news/resources/idt-sh/russia_election* [Accessed 23 May 2019].

[34] See, e.g. T. Burton, "How Russia's strongmen use homophobia to stay in power" (2 August017), *Vox*, *https://www.vox.com/identities/2017/8/2/16034630/russias-strongmen-homophobia-power-kadyrov-chechnya-lgbtq* [Accessed 23 May 2019].

[35] Bjorn van Roozendaal, programme director of ILGA, sees the tension between East and West as key in the struggle for the rights of sexual minorities: "We've seen a lot of backlash in the region. One common denominator is that Armenia, Azerbaijan, Russia all want to distance themselves from the west and the LGBTI struggle has been at the centre of that … LGBTI rights are seen as a modern Western value that the West is trying to impose and this mindset really comes at the cost of the LGBTI community" (M. Meaker, "Azerbaijan worst place to be gay in Europe, finds LGBTI index" (10 May 2016), *The Guardian*, *https://www.theguardian.com/world/2016/may/10/azerbaijan-worst-place-in-europe-to-be-gay-lgbt-rainbow-index* [Accessed 23 May 2019]); see also EuropeNow, "Homonegativity in Eastern Europe" (6 July 2017), *https://www.europenowjournal.org/2017/07/05/homonegativity-in-eastern-europe/* [Accessed 23 May 2019].

[36] See *Smith v United Kingdom* (2001) 31 E.H.R.R. 24 at [122] in which institutional testing of military personnel's sexual orientation was determined not to be sufficiently serious to constitute "degrading treatment" for the purposes of art.3. See also P. Johnson and S. Falcetta "Sexual orientation discrimination and article 3 of the European Convention on Human Rights: developing the protection of sexual minorities" (2018) 43(2) E.L. Rev. 167, 169.

[37] See *East African Asians v United Kingdom* [1973] 3 E.H.R.R 76.

link to homophobia in detention, in *X v Turkey*.[38] The case related to the harshness of the conditions of detention to which a homosexual applicant was subjected by state actors after hate crimes were perpetrated against him on grounds of sexual orientation by non-state actors while in detention.[39] The Strasbourg Court found that the extreme nature of the conditions of detention, including his subjection to a regime amounting to a harsh version of solitary confinement, and without access to an effective remedy to contest the conditions, was not justified by reference to concern for his safety.[40] It therefore accepted that these conditions amounted to inhuman and degrading treatment in violation of art.3, but the homophobic dimension of the situation was not *expressly* recognised as an aggravating factor giving rise to the finding that the threshold of seriousness under that article had been reached.

However, significantly, the Court also went on to find a breach of art.14 on the basis that the applicant's adverse treatment in detention had resulted from discrimination on grounds of sexual orientation on the part of the detention authorities, as opposed to providing a means of protecting him: "the applicant's sexual orientation was the main reason for the adoption of this measure".[41] That was significant since in a number of its earlier judgments in the field of sexual orientation, the Court had refused to consider a claim under art.14 once it had found a violation of a substantive right.[42]

Attacks and intimidation by non-state actors on grounds of sexual orientation

In a number of Member States laws have been enacted that specifically criminalise hate crime and hate speech against persons motivated by their sexuality (or the perception of their sexuality).[43] But in a number of states the fact that an offence is motivated by the victim's sexuality has no bearing on the sentence or the labelling of the offence.[44] Against that background, a number of applications have recently been brought to Strasbourg on the basis that the state has disregarded the homophobic dimension of offences, and/or failed to act to protect persons from sexual minorities from attacks and intimidation by non-state actors, motivated by hatred on grounds of sexual orientation.

Particularly striking examples of applications relating to attacks by non-state actors on grounds of sexuality include the following ones, brought under arts 3 and 14. *Identoba v Georgia*[45] concerned a peaceful anti-homophobia demonstration, which was disrupted by threatening counter-demonstrators who

[38] *X v Turkey* (App. No.24626/09), judgment of 9 October 2012. See also Harris, et al., *Law of the European Convention on Human Rights* (Oxford: OUP, 2014), p.269.

[39] The applicant, a gay man, had committed a number of fraud-related crimes and was placed in detention, sharing a cell with heterosexual detainees. He requested a transfer to a shared cell with other homosexual prisoners on the basis that he had been subjected to intimidation and bullying by the current inmates once they learned of his sexual orientation. The authorities responded to his complaint by placing him in a small individual cell, without access to any social activities—in effect he was placed in solitary confinement under very poor, confined living conditions involving complete exclusion from the prison community. His requests to be placed in a shared cell were disregarded and his challenges to his subjection to this regime failed domestically. No domestic merits review of the decision was conducted. This case may be contrasted with *Stasi v France* (App. No.25001/07), judgment of 20 October 2011 (European Court of Human Rights Press Release, "Prison authorities had taken all necessary measures to protect Inmate" (E.C.H.R. 203 (2011) HR), 20 October 2011) in which the applicant complained that he had been the victim of treatment contrary to art.3 by inmates, due to his homosexuality, and that the French authorities had failed to take the necessary measures to prevent this and had therefore violated his art.3 rights. The Court rejected the applicant's argument on the basis that appropriate measures had been taken to ensure his safety, such as placing him on a prison wing for vulnerable inmates once they were informed of his homosexuality, and investigating his complaints against the prison inmates.

[40] *X v Turkey* (App. No.24626/09) at [42].

[41] At [57]; it further stated that it was not "convinced that the need to take security measures to protect the physical integrity of the applicant was the overriding reason for [his] total exclusion … from prison life".

[42] See, e.g. *Dudgeon v United Kingdom* (1980) 3 E.H.R.R. 40; *Norris v Ireland* (1988) 13 E.H.R.R. 186; *Modinos v Cyprus* (1993) 16 E.H.R.R. 485; *Smith v United Kingdom* (2001) 31 E.H.R.R. 24.

[43] See ILGA-Europe, "Rainbow Europe Index 2018", *https://www.ilga-europe.org/resources/rainbow-europe/rainbow-europe-2018* [Accessed 15 April 2019].

[44] Such protections are absent in Bulgaria, Poland, Moldova the Czech Republic, Latvia, Azerbaijan, Armenia, Russia, Ukraine, Turkey, but not in Georgia. Eastern European states that have enacted hate crime or hate speech laws on grounds of sexual orientation include Albania, Croatia, Hungary, Macedonia, Kosovo, Montenegro, the Slovak Republic, Slovenia, Romania, Serbia, Bosnia and Hercegovina, Estonia and Lithuania (Rainbow Europe Index 2018).

[45] *Identoba v Georgia* (2018) 66 E.H.R.R. 17. The march was organised by the first applicant in Tbilisi in 2012 to mark International Day against Homophobia. The 13 applicants who had participated in the march complained at Strasbourg that the Georgian authorities had failed to protect them from the violent attacks of the counter-demonstrators and had also failed to investigate the incident effectively by establishing, in particular, the clearly discriminatory motive behind the attacks.

outnumbered the marchers and used physical violence against them. The Court found that the discriminatory overtones of the attacks against the participants were clear: the aim, it was found, "was evidently to frighten the applicants so that they would desist from their public expression of support for the LGBT community";[46] the authorities had known, or should have known, of the risks surrounding the demonstration, and were therefore under an obligation—which they were found to have breached—to ensure that sufficient protection for the marchers was available. The Court found a violation of art.3 read with art.14, and, in respect of certain applicants, a violation of art.11 read with art.14. Significantly, the finding that the severity of the treatment reached the art.3 threshold was based on the general homophobic context in Georgia,[47] the assault on the dignity of the applicants, and in particular on the "discriminatory remarks and insults [which] must … be considered as an aggravating factor when considering … ill-treatment in the light of article 3".[48] (It appears, however, that the Georgian authorities have failed to respond effectively to this ruling: the similar gathering in 2018 was cancelled by the organisers for fear of lack of protection from attacks.)[49]

Similar findings as to art.3 and art.14 were made on similar facts in *MC and AC v Romania*:[50] in that instance the applicants were attacked because they were on their way back from the annual Pride parade in Bucharest; their key complaint was once again that the investigation into the attack against them was inadequate, and in particular that the authorities had not taken into account the motivation of hatred on grounds of sexual orientation. The Court acknowledged "the LGBTI community in the respondent State finds itself in a precarious situation, being subject to negative attitudes towards its members".[51] The requisite threshold under art.3 was reached because "the treatment … to which they were subjected and which was directed at their identity … necessarily aroused … feelings of fear, anguish and insecurity … [and] was not compatible with respect for their human dignity".[52] The emphasis on dignity in both these instances in finding the breach of art.3 is significant. A number of similar instances have arisen[53] and similar cases are currently pending against certain "Eastern" states.[54] But at least one gay applicant seeking to challenge violations of the ECHR due to hate crimes perpetrated against her eventually had to seek asylum elsewhere in Europe, discontinuing the application.[55]

[46] At [70].

[47] The Court observed that negative attitudes towards members of the LGBT community were widespread in some parts of Georgian society: at [37].

[48] At [65].

[49] The gathering was also to mark the International Day against Homophobia; it was abandoned on the basis that the police response was likely to be incapable of protecting participants from attack by far-right and religious rallies that had been organised to coincide with it; instead, some very limited pro-gay demonstrations took place: see G. Lomsadze, "Small gay rights IDAHOTB rally held in Tbilisi amid fears of violence" (17 May 2018), *Eurasianet*, *https://eurasianet.org/small-gay-rights-rally-held-in-tbilisi-amid-fears-of-violence* [Accessed 23 May 2019].

[50] *MC and AC v Romania* (App. No.12060/12), judgment of 12 April 2016.

[51] At [118].

[52] At [119].

[53] In various "Eastern states", Pride marches are permitted, but in certain states they have been met with large, and often violent, counter-protests that are endorsed by the state or by high-profile politicians, as was the case for the 17th LGBTI Moldova Pride Festival, in which violent counter-protestors were praised by President Igor Dodon: ILGA-Europe, Annual Review 2019, Moldova country report; see also R. Holzhacker, "State-Sponsored Homophobia and the Denial of the Right of Assembly in Central and Eastern Europe: The 'Boomerang' and the 'Ricochet' between European Organizations and Civil Society to Uphold Human Rights" (2013) 35(1) *Law & Policy* 1; S. Kitto, "The Eastern European Gay Rights Movement Is Struggling to Be More Than a Western Cause" (30 September 2015), *https://www.vice.com/en_uk/article/jmanzg/beneath-the-national-palace-of-culture-0000749-v22n9* [Accessed 23 May 2019].

[54] See, e.g. *Aghdgomelashvili and Japaridze v Georgia* (App. No.7224/11), communicated to the Georgian Government on 3 December 2013, and *Sabalić v Croatia* (App. No.50231/13), communicated to the Croatian Government on 7 January 2014, which both concern complaints under arts 3, 13 and 14 about a lack of effective investigation by state authorities. *Sabalić* relates to an alleged homophobic attack, while *Aghdgomelashvili* concerned a police raid on an NGO that promotes LGBT rights.

[55] See *Oganezova v Armenia* (2013) concerning positive obligations placed on states regarding hate crimes on the basis of sexual orientation. The applicant, a member of the LGBT community who ran a night club in Armenia frequented by that community, was bringing the claim under arts 3, 8, 10 and 14 against Armenia for failing to prevent attacks on her and for subsequently failing to investigate, prosecute and punish the perpetrators of the hate crimes committed against her (see Pink Armenia, "Strategic Litigations: Oganezova v Armenia, 2nd application" (2013), *http://www.pinkarmenia.org/en/strategiclitigation/oganezova1/* [Accessed 23 May 2019]). There was an escalation in the number and intensity of attacks until she finally left Armenia for Sweden, where she sought asylum. Emigration of sexual minorities from certain Eastern states to seek asylum elsewhere in Council of Europe states appears to be increasing: see e.g. A. Minasyan, "Why LGBT People Emigrate from Armenia: Three Stories" (12 March 2018), *Heinrich Böll Stiftung*, *https://www.boell.de/en/2018/03/12/why-lgbt-people-emigrate-armenia-four-stories* [Accessed 23 May 2019].

Inciting hatred against sexual minorities or their supporters

The possibility that incitement of hatred against sexual minorities or their supporters by non-state actors could give rise to breaches of arts 8, 10 and 14 has arisen in the case of *Minasyan v Armenia*,[56] currently in the Court system. The claim is based on media attacks on the applicants due to their association with, and support for, the LGBT community. Their claim under arts 8 and 14 is that the domestic authorities had failed in a positive obligation to put in place an effective legal and procedural framework protecting them from discriminatory language and incitement of hatred against them due to such association and support, and that the domestic courts ignored their allegations of discrimination.[57] They are also claiming a breach of art.10 read with art.14 on the basis that the obligation placed on states not to "chill" speech should also be extended to non-state actors, especially where human rights' defenders are concerned, given that the applicants were targeted *because* they were expressing support for the rights of sexual minorities. Such expressions are clearly part of the general movement towards protecting such rights in the Member States of which the Court itself is a part.

Findings of principle

X v Turkey was a breakthrough decision due to its willingness to find a breach of art.3 in the context of state-condoned homophobia, and in the succeeding cases discussed the Court demonstrated a clearer willingness to accept overtly that the threshold demanded by the article would be reached due to that context. It is also clearly significant that the Court was prepared in a number of these instances to find violations of both arts 3 and 14 due to the hostility the applicants had faced on grounds of sexual orientation, which had gone unaddressed and unrecognised by the Member State in question. The Court in this first category of cases is at the most basic level recognising that political, institutional and societal homophobia creates a need to put in place specific measures providing protection for sexual minorities.[58] It is in effect seeking to ensure that the role played by the concepts of "hate crime" or "hate speech" on grounds of sexual orientation in some Member States is vindicated under the ECHR where they are absent from their domestic law.[59]

Strasbourg's stance in the cases in this category is notable for its lack of equivocation and its very forthright nature; that is in this instance in accordance with the strong consensus, since there is no consensus among the Member States to the effect that assaults on members or supporters of sexual minorities, motivated by hatred on grounds of sexual orientation, should be ignored or condoned, as discussed further in Section 6. Equally, although a number of states have no specific laws criminalising hate speech directed

[56] *Minasyan v Armenia* (App. No.59180/15), communicated to the Armenian Government on 21 February 2018. The applicants at a press conference had criticised the Armenian jury members of the 2014 Eurovision Song Contest. The jury members had stated that they had awarded the lowest points to Conchita Wurst due to transphobic/homophobic revulsion, since "just like mentally-ill persons cause aversion, so do such phenomena". The applicants were then attacked by *Iravunk* newspaper, in an article entitled "They Serve the Interests of International Gay Lobby: the Black List of Enemies of the Nation and the State", which included hyperlinks to a number of Facebook profiles, including those of the applicants, inciting readers to avoid any contact with them and not to employ them. Domestic proceedings against the newspaper failed, and it published further articles targeting the applicants.

[57] Activist intervenors are submitting material—L. Lavrysen, "Human Rights Centre submits a third party intervention in 'Conchita Wurst case'" (3 August 2018), *Strasbourg Observers*, *https://strasbourgobservers.com/2018/08/03/human-rights-centre-submits-a-third-party-intervention-in-conchita-wurst-case/#more-4208* [Accessed 23 May 2019].

[58] This recognition reflects the conclusions of the extremely significant 2011 report into the rights of sexual minorities in the Council of Europe by the High Commissioner of Human Rights and the subsequent resolution of the Council of Ministers in 2013: Hammarberg, Discrimination on grounds of SOGI in Europe; Parliamentary Assembly of the Council of Europe Resolution 1948(2013), para.9.1.8.

[59] See Resolution 1948(2013), para.9.1.7 and Parliamentary Assembly of the Council of Europe, "Follow-up to Committee of Ministers Recommendation CM/Rec(2010)5, on measures to combat discrimination on grounds of sexual orientation or gender identity" (18 March 2013), *https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/work-completed/dicrimination-on-lgbt* [Accessed 23 May 2019]; Q50 dealt specifically with the presence or absence of measures in place to "ensure that a bias motive related to sexual orientation may be taken into account as an aggravating circumstance …". A number of states, including Armenia, had no such measures. See further: Council of Europe Committee on Equality and Non-discrimination, "Tackling discrimination on the grounds of sexual orientation and gender identity: Report" (7 June 2013), pp.21–24. See also Article 19, Challenging hate, p.52, in Moldova, "public opinion on the rights of sexual minorities is sharply polarised, with some degree of independent debate about the rights … but with powerful anti-gay movements associated with widespread use of hate speech".

at sexual minorities—which is one reason why the outcome of *Minasyan* will be very significant—it does not appear to be the case that such speech is condoned by a majority of the Member States.

(4) State suppression of expression manifesting support for sexual minorities

The lack of protection for LGBT activists or sympathisers from intimidation or attack by non-state actors discussed in Section 3 forms one aspect of state hostility to public manifestations of support for sexual minorities. The same may be said of the cases discussed below, the second category of cases, concerning direct *state* suppression of expression providing such support. The clearest example of such suppression arose in the form of the introduction of the "anti-gay propaganda" law in Russia, the subject of a recent successful Strasbourg claim under art.10 read with art.14 in *Bayev v Russia*.[60] The applicants, gay rights activists, were prosecuted after holding up banners in support of homosexuality.[61] The Court considered that any margin of appreciation conceded would not be expected to be broad given the "clear European consensus about the recognition of individuals' right to openly identify themselves as gay, lesbian or any other sexual minority".[62] But in any event, the Court, in a very strongly worded judgment, did not consider that the aim in question under art.10(2), the protection of morals, was engaged, doubting the "alleged incompatibility between maintaining family values as the foundation of society, and acknowledging the social acceptance of homosexuality".[63] The Court found no reason to consider the two incompatible, and referred in particular to its own jurisprudence on the inclusion of relationships between same-sex couples within the concept of "family life" under art.8,[64] and its acknowledgement of the "need for their legal recognition and protection" in *Oliari v Italy*,[65] discussed below. It found that a state in choosing methods of protecting the family, must take into account developments in society "including the fact that there is not just one way or one choice when it comes to leading one's family or private life".[66] In a strong statement of principle the Court found "far from being opposed to family values—many persons belonging to sexual minorities manifest allegiance to the institutions of marriage, parenthood and adoption, as evidenced by the steady flow of applications to the Court from members of the LGBT community who wish to have access to them".[67]

The Court reiterated that it had consistently refused to endorse policies and decisions which "embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority",[68] and found that the law in question embodied such a bias.[69] Importantly, it further found that while popular support for barring manifestations of non-traditional sexuality was apparently manifestly present in Russia, it could not rely on such support to narrow down the scope of the substantive protection of a Convention guarantee, although it could be relied on to *extend* that scope.[70] In relation to this purported aim the majority judges

[60] *Bayev v Russia* (App. No.67667/09), judgment of 20 June 2017. The relevant law in the case was: No.172-22-OZ of the Archangelsk Oblast of 3 June 2003 "On Administrative Offences" Section 2.13: Public activities aimed at the promotion of homosexuality among minors (at [27]). See also the similar pending claim in *Klimova v Russia* (App. No.33421/16), communicated to the Russian Government on 26 October 2017, which concerns the conviction of the founder of the online support site for the same offence.

[61] The three applicants had held up banners near a school and a library stating, inter alia, "Homosexuality is normal" and referring to the very high rate of suicides in Russia of teenage homosexuals. They were each found guilty of the administrative offence of "public activities aimed at the promotion of homosexuality among minors". Russia accepted that there had been an interference under art.10, but sought to justify it under art.10(2) on the basis that the "anti-gay propaganda" law furthered the protection of morals, arguing that "an open manifestation of homosexuality was an affront to the mores prevailing among the religious and even non-religious majority of Russians and was generally seen as an obstacle to instilling traditional family values": at [65].

[62] At [66].

[63] At [67].

[64] See *PB and JS v Austria* (App. No.18984/02), judgment of 22 July 2010 at [27]–[30], and *Schalk v Austria* (2011) 53 E.H.R.R. 20 at [91]–[94].

[65] *Oliari v Italy* (2015) 65 E.H.R.R. 957 at [165].

[66] *Bayev v Russia* (App. No.67667/09), judgment of 20 June 2017 at [67]. See also *Kozak v Poland* (2010) 51 E.H.R.R. 16 at [98] and *X v Austria* (2013) 57 E.H.R.R. 14 at [139].

[67] At [67].

[68] At [68]. See also *Smith v United Kingdom* (2001) 31 E.H.R.R. 24 at [102]; *Salgueiro da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47 at [34]–[36]; and *LV v Austria* (2003) 36 E.H.R.R. 55 at [51]–[52].

[69] At [68].

[70] At [70].

not only found that the bias against homosexuality inherent in the domestic law was unacceptable, but found "[e]ven more unacceptable are the attempts to draw parallels between homosexuality and paedophilia".[71] The Court dismissed the other two claims as to legitimate aims;[72] since it found that the measure in question did not serve any of the aims, and indeed was counter-productive to the latter two, a breach of art.10 was found. The Court ended with a robust conclusion to the effect that "by adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia".[73] The Russian judge's (Judge Dedov) dissent on this point is of interest; he equated homosexuality with paedophilia, and argued that the case concerned a clash between free expression and the protection of children from sexual abuse,[74] ending his dissent by arguing that the law in question should be characterised at Strasbourg as "positive discrimination … to protect the traditional values of Russian society", in order to "respect [the family] as … traditionally understood in Russia".

The Court proceeded also to find a violation of art.14 on the well-established basis that differences in treatment based on sexual orientation would require particularly convincing and weighty reasons to justify them, and for the reasons given in relation to the art.10 analysis, such reasons were not available. The law in question was on its face discriminatory since it banned "promoting the attractiveness of non-traditional sexual relationships, creating a distorted image of the social equivalence of traditional and non-traditional sexual relationships".[75] In this "anti-gay propaganda" case, then, the Court robustly relied on societal developments in the Member States generally—reflecting the consensus on this matter—encompassing the need to recognise that same-sex relationships are an expression of family life, in the same way that different-sex relationships are. But, as will be argued in Section 5, in the "family life" cases themselves, a less robust approach has been taken, linked to prejudices held by majorities in states, potentially facilitating state-based denial of the need to recognise and protect same-sex unions.

Bayev strongly reaffirms concerns previously expressed by the Council of Europe as to so-called "anti-gay propaganda" legislation,[76] which is not confined to Russia.[77] That Russian law, which was also recently condemned as breaching the ICCPR,[78] not only appears to have encouraged homophobia in Russian civil society, but also may have influenced the intimidation and harassment of sexual minorities in some Eurasian Member States in the period not long after the Russian law was passed.[79] Russia has compensated the applicant, as requested in the judgment, but has made no public concessions to this ruling, nor repealed the law, although it has been used fairly sparingly.[80] Russia appears to consider that its

[71] At [69].

[72] The claims were based on the right to health or the protection of the rights of others (of children); they were dismissed in a similarly robust fashion, finding as to the latter aim in relation to children: "The Government were unable to provide any explanation of the mechanism by which a minor could be enticed into '[a] homosexual lifestyle', let alone science-based evidence that one's sexual orientation or identity is susceptible to change under external influence": at [78].

[73] At [83].

[74] Therefore, he considered, the interference should have been found to be justified under art.10(2), bearing the margin of appreciation that should, in his view, have been accorded to Russia.

[75] At [90].

[76] Resolution 1948(2013) "… these acts and bills, which are at variance with freedom of expression and the prohibition of discrimination on account of sexual orientation and gender identity, risk legitimising the prejudice and hostility which is present in society and fuelling a climate of hatred against LGBT people".

[77] See fn.83 below.

[78] In July 2018 The UN Human Rights Committee ruled that the anti-gay propaganda law in Russia's Arkhangelsk region was "ambiguous, disproportionate and discriminatory" (CCPR/C/123/D/2318/2013). See also Article 19, Challenging hate, pp.74, 79 (Russia).

[79] The Russian law reflected and reinforced themes of homophobic hate speech in civil society in a number of Eurasian states, e.g. Moldova and Ukraine: Article 19, Challenging hate, pp.51–52 (Moldova), 90, 99 (Ukraine).

[80] "Communication from the Russian Federation concerning the cases of Alekseyev and Bayev and Others v. Russian Federation" (DH-DD(2018)1047 Action plan (22/10/2018)). See for criticism of the Russian response: Coming Out and ILGA-Europe, "Rule 9(2) submission to the Committee of Ministers of the Council of Europe concerning implementation of the Alekseyev and others v. Russia and Bayev and others v. Russia cases" (December 2018); European Commission on Racism and Intolerance, "ECRI Report on the Russian Federation" (CRI(2019)2, 5 March 2019), paras 112–115. Examples of fines issued under the law subsequently to the *Bayev* judgment include that of Evdokiya Romanova, a member of the Youth Coalition for Sexual and reproductive Rights, who was fined 50,000 rubles (around €750) under the law due to articles published on social networking sites that discussed LGBT rights, Article 19, Challenging hate, p.80. In May 2018 the law was used to shut down ParniPlus, an HIV awareness website, K. Knight, "Russia's 'Gay Propaganda' Censor Attacks Health Website" Human Rights Watch (10 May 2018)*https://www.hrw.org/news/2018/05/10/russias-gay-propaganda-censor-attacks-health-website* [Accessed 23 May 2019]. In October 2018 the conviction of 16-year-old Maxim Neverov,

international reputation requires no more than that. Nevertheless, this ruling is very significant because the position in post-Soviet states on this matter is far from uniform, broadly aligning with either pro-Western or pro-Russia sentiment linked to Russia's geographical sphere of influence.[81] *Bayev*'s impact in some post-Soviet states aligned more closely to Europe may have the potential to aid in countering that influence.[82]

Nonetheless, at present forms of "anti-gay propaganda" legislation are in place, or proposed, in certain "Eastern" states.[83] Even where that is not the case, attempts to silence pro-gay voices are apparent in certain states. To an extent, that is the case in Turkey,[84] and may have underpinned the actions taken in *Kaos GL v Turkey*[85]: speech supportive of sexual minorities, accompanied by quite explicit images, was suppressed when the authorities seized copies of an issue of a gay activist magazine, before its distribution. Its suppression was found to lead to a violation of art.10 at Strasbourg on grounds of disproportionality,[86] but art.14 was not considered. That was a reasonably forthright judgment when compared with the judgment on fairly similar facts in *Muller v Switzerland*[87] in which the proportionality analysis was much less robust; its stance in *Kaos GL* possibly reflected the Court's concern that homophobia underlay the real motivation behind seizure of the magazine, which arguably was both symptomatic of and supportive of a rising level of homophobia in Turkey, where certain gay cultural events have also been banned.[88]

Alongside the banning of speech supportive of rights of sexual minorities, LGBT-supporting assemblies have been banned regularly in a number of "Eastern" states. In *Alekseyev v Russia*[89] the Strasbourg Court found that Russia had violated arts 11, 13, and 14 by banning 164 Pride events and marches between 2006 and 2008. The same outcome was arrived at on similar facts in relation to further bans on Pride marches

who had been fined 50,000 rubles for posting images of shirtless men hugging on social media, was successfully appealed on the grounds of lack of evidence that "non-traditional" sexuality had been promoted by the defendant's actions (D. Litvinova, "In LGBT+ rights victory, Russian teen wins 'gay propaganda' case" (26 October 2018), *Reuters*, *https://www.reuters.com/article/us-russia-lgbt-ruling/in-lgbt-rights-victoryrussian-teenwins-gaypropaganda-case-idUSKCN1N02JY* [Accessed 23 May 2019]).

[81] For example, Latvia, Lithuania, Estonia were in the westernmost part of the Soviet Union and have a long history of close contact with Europe. The western part of Ukraine has historic links to Europe, while the eastern part is culturally and religiously much more aligned with Russia: see R. Holzhacker, "State-Sponsored Homophobia and the Denial of the Right of Assembly in Central and Eastern Europe: The 'Boomerang' and the 'Ricochet' between European Organizations and Civil Society to Uphold Human Rights" (2013) 35(1) *Law & Policy* 1. See also fn.83 below.

[82] For example, in Ukraine a petition for "homosexual propaganda" was removed from the President's website citing the fact that the petition was contrary to the ECHR after Bayev: ILGA-Europe, Annual Review 2019, Ukraine.

[83] Russia is the only member state to enact a law which, in an explanatory note to the law, specifically refers to sexual "propaganda" (Article 19, Challenging hate, p.4), but a Lithuanian law on "protection of minors against the detrimental effect of public information" refers to a "traditional family model" which impliedly excludes homosexual relationships and the Latvian Education law encompasses promotion of the Latvian exclusively heterosexual marriage as per the Latvian Constitution (International Lesbian, Gay, Bisexual, Transgender, Queer & Intersex (LGBTQI) Youth & Student Organisation and Thomson Reuters Foundation, "Expression Abridged: Legal Analysis of Anti-LGBT Propaganda Laws" (24 April 2018), *https://www.iglyo.com/wp-content/uploads/2018/04/IGLYO-Report_A4_digital.pdf* [Accessed 23 May 2019], pp.12–13). Furthermore, the legislatures of Azerbaijan, Armenia, Romania, Lithuania, Moldova, Poland and Ukraine have all considered petitions and Bills to implement such laws (pp.11–14), and I. Fedorovych and Y. Yoursky, "Legislative Analysis Related to LGBTQ Rights and HIV in 11 CEECA Countries" (ECOM, 2018), cited in M. Beury and Y. Yoursky, "Europe—Increased Visibility, Populist Backlash and Multiple Divisions", in L.R Manos (ed.), *State Sponsored Homophobia* (ILGA-world, 2019), fn.22. In Poland, draft propaganda legislation to ban homosexuals from the teaching profession was proposed in March 2017, but this proposal was not voted on after elections later that year. In the Ukraine, despite the failure of a Bill to be passed after it was withdrawn in 2014, the issue remains popular and its return to the legislative agenda is routinely debated. See J. De Kerf, "Anti-Gay Propaganda Laws: Time for the European Court of Human Rights to Overcome Her Fear of Commitment" (2017) 4(1) *Journal of Diversity and Gender Studies* 35. In Bulgaria the city of Asotthalom's "anti-propaganda" regulations were annulled by the Constitutional Court. Note that certain non-Member States, such as Kazakhstan and Belarus (adjacent to Russia), have enacted similar laws. The Kazakhstani law specifically refers to sexual propaganda, while the Belarussian law prohibits dissemination of information that could "discredit the institution of family and marriage".

[84] Turkey has no specific "anti-gay propaganda" law at present but a number of localities have banned gay cultural events: C. Fishwick, "'It's just the start': LGBT community in Turkey fears government crackdown" (23 November 2017), *The Guardian*, *https://www.theguardian.com/world/2017/nov/23/its-just-the-start-lgbt-community-in-turkey-fears-government-crackdown* [Accessed 23 May 2019]. Ankara banned such events and German gay films in November 2017, citing threats to public order and fear of "provoking reactions within certain segments of society".

[85] *Kaos GL v Turkey* (App. No.4982/07), judgment of 22 November 2016.

[86] The applicant was a Turkish association known as "The Kaos cultural research and solidarity association for gays and lesbians". The issue of its magazine, *Kaos GL*, contained articles and interviews on pornography related to homosexuality, and its editor was then convicted of publishing obscene images. In undertaking the proportionality analysis under art.10(2) the Court found that the domestic authorities had not attempted to implement any preventive measure less harsh than seizure of all the copies of the issue in question, such as prohibiting the sale of the magazine to persons under the age of 18.

[87] *Muller v Switzerland* (1991) 13 E.H.R.R. 212. It concerned explicit paintings but with no obvious homophobic dimension.

[88] See fn.84 above in relation to the situation in Turkey.

[89] *Genderdoc-M v Moldova* (App. No.4916/07), judgment of 21 October 2010.

in Russia in 51 joined applications in 2018.[90] Similarly, *Genderdoc-M v Moldova*[91] concerned a ban on a demonstration in support of protecting sexual minorities from discrimination, which was also found to violate arts 11, 13, and 14, and in *Bączkowski v Poland*[92] the Polish authorities' refusal of permission for a pro-LGBT march was also found to give rise to violations of those articles.

Conclusions

The Court's stance on so-called "anti-gay propaganda" laws, on suppression of pro-LGBT expression, and of LGBT-supporting marches/demonstrations, can be viewed as aiding in shoring up the pro-liberalising forces in the various states. Its bold stance in *Bayev* was clearly influenced by the strong consensus in the Member States on such suppression, given that very few states have forms of anti-gay propaganda laws in place, as discussed further in Section 6, below. It is one aspect of its stance favouring the finding of breaches of a number of articles, in particular including art.14, where the state itself suppresses speech or marches supportive of sexual minorities. Thus, the Strasbourg approach in this category of cases largely coheres with its stance in the first category as to state failures to recognise hate crimes and hate speech on grounds of sexual orientation, although violations of art.3 have not yet featured.

(5) Addressing some "East"/"West" divisions on same-sex marriage and registered partnerships

Introduction

The position as to state formalisations of same-sex unions has changed with very striking rapidity over the last 20 years among the Member States,[93] but the spread of such formalisations across the states has been uneven: as indicated in Section 2, some "East"/"West" divisions between the Member States have emerged on this matter. At the present time the majority of states, including all the "Western" ones, have introduced same-sex marriage[94] and/or forms of registered partnership schemes for same-sex couples.[95] But a number of "Eastern" states have shown no or little inclination to introduce such schemes,[96] and in a few instances they have evinced a steadfast refusal to do so,[97] while a number of them have also recently enshrined a ban on same-sex marriage in their Constitutions.[98] But it would not be correct to find that a

[90] *Alekseyev v Russia* (App. No.14988/09), judgment of 27 November 2018; the claim for just satisfaction was rejected partially on the basis that the Council of Ministers was overseeing the implementation of the 2010 judgment (at [28]). A subsequent application concerning pride marches in Russia has been submitted and is pending: *Alekseyev v Russia* (App. No.31782/15), communicated to the Russian government on 15 January 2016.

[91] *Genderdoc-M v Moldova* (App. No.9106/06), judgment of 12 June 2012.

[92] *Bączkowski v Poland* (2009) 48 E.H.R.R. 19.

[93] For a comparative analysis, see J.M. Scherpe and A. Hayward (eds), *The Future of Registered Partnerships* (Cambridge: Intersentia, 2017); K. Boele-Woelki and A. Fuchs, *Same Sex Relations and Beyond—Gender Matters in the EU* (Cambridge: Intersentia, 2017); I. Curry-Sumner, *All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe* (Cambridge: Intersentia, 2005); K Waaldijk, "Overview of the results from the legal survey", in K Waaldjik (ed.), *More and more together: Legal family formats for same sex and different sex couples in European countries* (Families And Societies Working Paper Series, Stockholm University 2017), *www.familiesandsocieties.eu/wp-content/uploads/2017/04/WorkingPaper75.pdf* [Accessed 23 May 2019].

[94] Same-sex marriage, usually preceded by the introduction of same-sex registered partnerships, is available in Portugal, Spain, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Sweden, United Kingdom (bar Northern Ireland), Austria (which introduced same-sex marriage on 1 January 2019). See further J.M. Scherpe, "Formal recognition of adult relationships and legal gender in a comparative perspective", in C. Ashford and A. Maine (eds), *Research Handbook on Gender, Sexuality and the Law* (Cheltenham: Edward Elgar Publishing, 2019).

[95] Forms of same-sex registered partnership, but not marriage, are available in Andorra, Croatia, Czech Republic, Cyprus, Estonia, Greece, Hungary, Italy, Liechenstein, Slovenia, San Marino and Switzerland.

[96] Neither marriage nor registered partnership is available at present for same-sex couples in Albania, Azerbaijan, Armenia, Bosnia and Herzegovina, Bulgaria, Georgia, Lithuania, Macedonia, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovak Republic, Turkey, Ukraine, Monaco.

[97] No same-sex partnership scheme has been considered at a legislative level in Armenia, Azerbaijan, Moldova, Turkey and Russia.

[98] Bans on same-sex marriage, or definitions of marriage which exclude same-sex couples, exist in the Constitutions of Armenia, Bulgaria, Croatia, Georgia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, the Slovak Republic and the Ukraine. In October 2018 a referendum to amend Romania's constitution to exclude same-sex marriage was rejected: L. Ilie, "Romanian constitutional ban on same sex marriage fails on low vote turnout", *Reuters* (6 October 2018), *https://www.reuters.com/article/us-romania-referendum/romanian-vote-to-ban-same-sex-marriage-fails-on-low-turnout-idUSKCN1MH0XI* [Accessed 23 May 2019]. Italy is the only "Western" state which continues to adopt such a definition in its constitution.

simplistic pattern of ready acceptance of state formalisation of same-sex relationships in "Western" states,[99] and a rejection of them in "Eastern" ones[100] has fully emerged. A number of predominantly Western European Member States introduced same-sex registered partnership schemes around 8–30 years ago,[101] usually phasing them out following the subsequent introduction of same-sex marriage.[102] But some Western states introduced them much more recently,[103] after certain "Eastern" states—Slovenia, the Czech Republic and Hungary—had already done so.[104] Certain states on either side of the "divide", including Estonia and Italy, only introduced registered partnership schemes covering same-sex couples in the last few years,[105] while in some inequality is perpetuated since different-sex couples can access marriage *or* a registered partnership, while same-sex couples can only access a registered partnership.[106]

Change in certain "Eastern" states may be imminent: some have brought forward Bills in the last few years to introduce same-sex registered partnerships, but they have not yet passed, as is the case in the Slovak Republic,[107] Bulgaria, Ukraine,[108] Latvia,[109] Lithuania,[110] Romania,[111] Poland[112] and Montenegro.[113] Citizens therefore in Western states and some Eastern ones have been able to rely on their own legislatures to introduce same-sex registered partnership schemes (in some instances prompted to do so by rulings domestically or at Strasbourg, as discussed below). But same-sex couples in certain "Eastern" states taking

See further: H. Fenwick, "Same sex unions at the Strasbourg Court in a divided Europe: calling the legitimacy of the Court into question?" (2016) 3 E.H.R.L.R. 249.

[99] See for "Western states" fn.4 above.

[100] See for "Eastern states" fn.4 above.

[101] They were introduced as follows: the Netherlands (1998), Spain (1998), France (1999), Belgium (2000), Portugal (2001), Luxembourg (2004), the UK (2004), Andorra (2005), the Czech Republic (2006), Slovenia (2006), Switzerland (2007), Hungary (2009), Austria (2010), Liechtenstein (2011), Isle of Man (2011), Jersey (2011).

[102] See fn.94 above. England, Wales and Scotland retained registered partnerships after same-sex marriage was introduced.

[103] Italy (2016), San Marino (2018).

[104] See fn.101 above.

[105] Estonia in 2016 (although the rights are limited relative to different-sex marriages), and Italy in 2016. Note: Croatia introduced registered partnerships in 2014.

[106] This is the position in Andorra, Greece, Cyprus, and Estonia. See D. Lima, "Registered Partnerships in Greece and Cyprus", in J.M. Scherpe and A. Hayward (eds), *The Future of Registered Partnerships* (Cambridge: Intersentia, 2017). Anomalously, the opposing position pertains in England, Wales and Jersey at the present time: same-sex couples can access a civil partnership or marriage; different-sex couples can only access marriage. But see now the Supreme Court decision in *R. (Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32 in which arts 8 and 14 combined were found to be breached by according unequal access to a formal relationship status on grounds of sexual orientation; as a result, the same-sex civil partnership regime will now be extended to different-sex couples by 30 December 2019.

[107] In 2012 a registered partnership Bill was submitted to the Slovakian Parliament but was refused a second reading by a large majority; however, public opposition to formal recognition of same-sex unions appears to be weakening. A 2015 referendum intended to lead to strengthening the constitutional ban on same-sex marriage and same-sex adoption in the Slovak Republic was declared invalid after only just over 20% of voters responded.

[108] Bulgaria considered adding different and same-sex couples to its Family Code in 2012 but has not so far done so. A package of proposed constitutional reforms came before the Ukrainian Parliament in 2015, and included a proposal for formalisation of same-sex unions, but the proposal continues to be opposed by the All-Ukrainian Council of Churches and Religious Organizations: ILGA-Europe, "Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2016" (2016), *https://www.ilga-europe.org/sites/default/files/2016/full_annual_review.pdf* [Accessed 14 April 2019], p.169 ("ILGA-Europe, Annual Review 2016"). The proposals have not yet been acted upon: ILGA-Europe, Annual Review 2018, p.129.

[109] In 2015 a Bill was put forward in Latvia to modify the Civil Code to provide for registered partnerships; it was put forward on 30 January 2015 by Veiko Spolītis, a Member of Parliament for Straujuma's Unity party. The proposed law would have allowed "any two persons" to register their partnership and thereby they would have acquired almost the same rights and obligations as married couples. But the proposal was rejected by the Legal Affairs Committee on 24 February 2015. See ILGA-Europe, Annual Review 2016, p.101.

[110] Despite delays, legislation on this matter may emerge in 2019/20. Similar proposals had emerged in Lithuania in 2018 but were rejected, despite achieving significant support among MPs. See further re Lithuania, fn.168 below.

[111] In 2015 the Legal Committee of the Romanian Chamber of Deputies considered a legislative proposal aimed at legalising same-sex registered partnerships, but it was rejected. It was the third proposal of that kind introduced in less than three years: ILGA 2016, Annual Review 2016, p.126.

[112] Three draft bills on gender-neutral registered partnerships have been considered so far in the Polish legislature but none have passed into law: see ILGA 2016, Annual Review 2016, p.131. The 2015 Bill was defeated by 215 votes to 146, 24 abstained. There has been no further legislative action: ILGA-Europe, Annual Review 2018, p.104.

[113] In 2019/20 the position in Montenegro may be about to change. In December 2018 the Montenegro cabinet passed a draft Bill on same-sex registered partnerships to go before the Parliament in the 2019–20 session. The Bill was proposed by Montenegro's Human and Minority Rights Ministry, but it has aroused opposition from the influential Serbian Orthodox Church and conservative opposition parties, including the pro-Russian Front: see D. Tomovic, "Plan for Same Sex Unions Rouses Fury in Montenegro", *Balkan Insight* (25 April 2018), *http://www.balkaninsight.com/en/article/recognition-of-same-sex-unions-causes-controversy-in-montenegro-04-25-2018* [Accessed 20 April 2019]. In February 2019 a draft law on same-sex communities was endorsed by the Montenegro Parliamentary Committee on Human Rights.

a stance opposed to, or reluctant/equivocal as to formalisations of same-sex relationships, may have to wait for Strasbourg rulings which could potentially therefore be crucial, or at least persuasive.[114]

Inequality of access to formal relationship statuses/benefits on grounds of sexual orientation under the ECHR framework

Lack of access to formal relationship statuses, or the benefits thereby accruing, for same-sex couples creates inequality based on sexual orientation, in various respects. In a number of almost exclusively "Eastern" states only one form of formalisation of unions is available—marriage, from which same-sex couples are excluded.[115] Therefore such couples who wish to formalise their relationship are denied civic benefits and subjected to the indignity of denial of public affirmation of their relationship. Clearly, same-sex cohabitants, like different-sex ones, generally cannot access various civic benefits, such as a survivor's pension,[116] but the heterosexual cohabitants have the option of marrying to obtain such access. That position can also strongly reinforce a general cultural acceptance of homophobia, and furthers the notion that homophobia should be accorded legal recognition. The focus on the welcome spread of same-sex marriage in (largely) "Western" Member States should not be allowed to obscure the plight of those same-sex couples in states where they are denied *any* form of formalisation of their relationships, and where at present the introduction of same-sex marriage is a distant prospect.[117] In states where same-sex registered partnerships *are* available, but not marriage, the benefits accruing vary from state to state; in certain states the partnerships are in that respect far from equivalent to marriage, especially in respect of adoption.[118]

Inequality of access to a formalised relationship status on grounds of sexual orientation gives rise to established or potential breaches of a number of ECHR articles on at least four bases. First, a breach of art.8 read with art.14 or alone (or potentially, art.12) may arise if a state denies formal recognition of their union to same-sex couples. That also includes couples who have already married or entered a same-sex registered partnership abroad. For example, a number of same-sex couples from Ukraine have entered a registered partnership (and sometimes then a same-sex marriage) abroad, in states such as Denmark or Germany, but if they then return to Ukraine their formal union is not at present recognised.[119] In Russia at least one such couple married abroad and then unsuccessfully sought formal recognition for their union in Russia; they then had to flee the country due to intimidation and death threats.[120] Secondly, where no

[114] Obviously if a successful application to Strasbourg by a same-sex couple in one of those states was brought challenging the lack of any means of formalising their relationship, the state would be bound under art.46 of the ECHR to implement the ruling, although clearly delay might occur. Other states providing no such means would not be bound by the decision but should implement it under their art.1 and art.13 ECHR duties; see, e.g. Georgia—in April 2018 the Georgian Ombudsman urged the Government to allow civil partnerships for same-sex couples, referring to *Oliari v Italy* (2015) 65 E.H.R.R. 957"Public defender urges Georgia to adopt civil partnerships for queer couples" (6 April 2019), *OC Media*, *https://oc-media.org/public-defender-urges-georgia-to-adopt-civil-partnerships-for-queer-couples/* [Accessed 25 April 2019], see further re *Oliari* fn.142 below.

[115] See fn.95 above.

[116] See discussion of *Aldeguer Tomás v Spain* (2017) 65 E.H.R.R. 24 in fn.186 below.

[117] See D. McGoldrick, "The Development and Status of Sexual Orientation Discrimination under International Human Rights Law" (2016) 16 H.R.L.R. 613, 665–667. See also fn.97 below.

[118] The legal consequences and the civic benefits conferred by such partnerships do not necessarily mirror those available via contracting marriage, and marriage tends to be viewed as the more privileged status. For example, the registered partnership schemes in Croatia, Czech Republic, Hungary, Italy and Slovenia do not permit joint adoption. The extent to which the level of benefits accruing to persons in a registered partnership is similar to those accruing via marriage varies from state to state. For a comparative overview, see J.M. Scherpe, "The Past, Present and Future of Registered Partnerships", in J.M. Scherpe and A. Hayward (eds), *The Future of Registered Partnerships* (Cambridge: Intersentia, 2017); W. Eskridge, *Equality Practice: Civil Unions and the Future of Gay Rights* (New York: Routledge, 2002); I. Curry-Sumner, "Same sex relationships in a European perspective", in J.M. Scherpe, *European Family Law Volume III—Family Law in a European Perspective* (Cheltenham: Edward Elgar, 2016); N. Bamforth, "The benefits of Marriage in all but name: Same-sex couples and the Civil Partnership Act 2004" (2007) 19(2) *Child and Family Law Quarterly* 133.

[119] See UNIAN, "Same sex marriage in Ukraine: accept or deny?" (14 February 2018), *https://www.unian.info/society/2395054-same-sex-marriage-in-ukraine-accept-or-deny.html* [Accessed 23 May 2019].

[120] *The Guardian* reported in 2018 that: "Two gay men whose marriage [in Denmark] was registered by Russian officials have fled the country after receiving death threats and having the electricity and internet reportedly cut off by plainclothes police who besieged their apartment in Moscow" (M. Bennetts, "Gay married couple flee Russia after receiving death threats" (29 January 2018), *The Guardian*, *https://www.theguardian.com/world/2018/jan/29/gay-married-couple-flee-russia-after-receiving-death-threats* [Accessed 23 May 2019]). See also a further detailed report in *The Guardian* by M. Bennetts including interviews with the two men after they had obtained asylum in Denmark ("'Alone and in fear": ordeal of married gay couple forced to flee Russia" (5 September 2018), *The Guardian*, *https://www.theguardian.com/world/2018/sep/05/alone-and-in-fear-ordeal-of-married-gay-couple-forced-to-flee-russia* [Accessed 23 May 2019].

means of formalising their relationship is available, a breach of art.8, (potentially, art.12), Protocol 1 art.1, all alone or read with art.14, could arise since a same-sex cohabitant would be unable to access the benefits a married couple could access, since the bar to accessing them arises on grounds of sexual orientation.[121] Thirdly, a breach of art.8 read with art.14 or arises where a same-sex partner of a citizen of the state in question is unable to enter or remain in the state, although a spouse (or in some instances a different-sex registered partner) of such a citizen would have been able to enter/remain. Fourthly, a breach of art.12 read alone or with art.14 could potentially arise where a different-sex couple can access marriage but a same-sex couple cannot, even if they can access a registered partnership.[122]

The current Strasbourg response

The response to this situation at Strasbourg in this third category of cases has been heavily dependent on a developing and still weak consensus, in contrast to its response in the other two categories. Until quite recently a state offering no same-sex registered partnership[123] scheme might have expected to enjoy a wide margin of appreciation since, until around 2014, there was no clear consensus on the matter among the Member States—only a minority had introduced such schemes.[124] As discussed below, Strasbourg has recently changed its position on same-sex registered partnerships since a thin majority of Member States have introduced them.[125] But the position differs as to the introduction of same-sex *marriage* at the present time; as discussed below, due to the lack of a consensus on the matter, a wide margin of appreciation is granted to Member States that have not introduced it, under art.12 read alone or with art.14.[126]

The first step towards recognising an ECHR right to formal recognition of their relationships for same-sex couples, taken in *Schalk*,[127] was to recognise same-sex couples as "families" under art.8 read with art.14, but the Court did *not* make this finding mainly or solely on the basis of the principle that since same-sex couples are as capable of exhibiting the characteristics of a "family"[128] as opposite sex ones, they should be treated accordingly. It relied instead on the changing consensus as to the broadening of the concept of "family" in Member States, finding that since a rapid evolution of social attitudes towards same-sex couples, and of the concept of "family", had occurred,[129] the applicants, as a same-sex couple living in a stable *de facto* partnership, did fall within the notion of "family life".

But while bringing same-sex couples within the concept of "family", and recognising that the applicant couple was in a relevantly similar situation to a different-sex couple as regards their need for "legal recognition and protection of their relationship",[130] the Court also reaffirmed in *Schalk* that nevertheless they would be debarred from accessing marriage under art.12[131] due to the lack of a consensus on the

[121] See also the interpretation of these articles by the UK Supreme Court in this context, *Re McLaughlin's Application for Judicial Review* [2018] UKSC 48.

[122] Certain states offer the availability of marriage to different-sex partners and of a registered partnership to same-sex ones, notably, Croatia, Czech Republic, Italy, Hungary, Liechtenstein, Switzerland and the UK (Northern Ireland only).

[123] Note: the term "registered partnerships" will be used throughout this article as the generally accepted generic term; clearly the terms used in the various states differ (e.g. "civil partnerships", "civil unions").

[124] *Schalk v Austria* (2011) 53 E.H.R.R. 20 at [58].

[125] See *Oliari v Italy* (2015) 65 E.H.R.R. 957 at [178]. Some states after their introduction then abandoned the schemes on the introduction of same-sex marriage. Therefore, the "majority" should be taken to refer to Member States that provide at least one form of formalised relationship status to same-sex couples.

[126] But see fn.136 below.

[127] *Schalk v Austria* (2011) 53 E.H.R.R. 20.

[128] The Court acknowledged that "same-sex couples are just as capable as different-sex couples of entering into stable committed relationships" at [94], but that finding did not form the main basis for the finding as to the meaning of "family".

[129] See art.9 of the EU Charter of Fundamental Rights, taken into account in *Schalk*, which provides a gender-neutral concept of marriage and family: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights".

[130] At [99]. That was confirmed by the Grand Chamber in *X v Austria* (2013) 57 E.H.R.R. 14.

[131] At [63]. See also the findings on same-sex marriage in *Hämäläinen v Finland* (App. No.37359/09), judgment of 16 July 2014 at [74]. The applicants further argued in *Schalk* under art.8, read with art.14, that there could be no objective justification for excluding same-sex couples from contracting marriage, but the Court dismissed that claim on the basis that art.8, as of more general purpose and scope than art.12, could not be interpreted as imposing an obligation to allow same-sex marriage either: at [101]. In other words, under the principle of *lex specialis derogat legi generali* the specific nature of art.12 means that a right to same-sex marriage could not be locatable in art.8 as of a more general other nature. That was reiterated

matter, while accepting that that finding did not derive from the *wording* of the article.[132] Strasbourg's cautious stance on that issue can be readily compared with the more robust one taken by the Inter-American Court of Human Rights, although it is not suggested that the two Courts are in the same position.[133] Strasbourg's interpretation of art.12 has been upheld consistently since *Schalk* on the basis of a continuing lack of consensus in the Member States as to the availability of same-sex marriage.[134] However, it should be noted that in *Orlandi v Italy*[135] the Court left open the possibility that if the consensus strengthened in future, the Court might be prepared to recognise a right to marry for same-sex couples under art.12,[136] a finding that attracted a strongly worded dissent from the Polish and Czech judges.[137] The consensus on same-sex marriage is in a state of transition, so the Court appears to view its stance as adhering to the principle of subsidiarity by according outlier states time to introduce such marriage before they could be compelled to do so under a strengthened consensus.

But there is *already* a consensus among the Member States as to the availability of same-sex registered partnership schemes,[138] so the Court has shown more receptivity to recognising a right to such a partnership under art.8 read alone or with art.14. In *Vallianatos*[139] the applicants, who were in same-sex unions, challenged their exclusion from the registered partnership scheme introduced in Greece for different-sex couples, under art.8 read with art.14. The Court found that same-sex couples: "have the same needs in terms of mutual support and assistance as different-sex couples … a civil union would afford the former the only opportunity available to them under Greek law of formalizing their relationships … [that] would allow them to regulate issues concerning property, maintenance and inheritance", and have their relationship officially recognised.[140] The government sought under art.14 to justify the exclusion of same-sex couples from the scheme on the basis of the need to make provision for unmarried different-sex couples with children. In evaluating that justification the Court relied on a trend-based version of consensus analysis,

in *Hämäläinen*: "The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman … While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see Schalk and Kopf § 63)". See also *Rees v United Kingdom* (1987) 9 E.H.R.R. 56 at [49].

[132] The lack of consensus was relied on at [58]. As to wording—the Court found that the original intention behind the wording of art.12 was to confine marriage to different-sex couples. But under its "living instrument" approach it accepted, taking account of art.9 of the European Charter of Fundamental Rights, that the wording of art.12 could be interpreted to cover same-sex couples, although it did not adopt that interpretation at that point: at [54]–[61].

[133] See Advisory Opinion OC-24/17, IACtHR Series A, 24 (2017), which concerned Costa Rica's request for clarification whether, inter alia, art.17 (the right to family) and art.24 (the right to equal protection) of the American Convention on Human Rights required states to recognise "a specific mechanism to govern relationships between persons of the same sex". In finding that these articles did create such a requirement, encompassing recognition of gay marriage, the Court observed that the lack of consensus among American states could *not* justify the rejection of gay marriage. This difference in stance is likely to be due to regional sensitivities, since—as Dominic McGoldrick observes—the "impression that sexual orientation rights is a 'Western' conspiracy against non-Western States" is less apparent in the Americas, in contrast to Council of Europe states ("The Development and Status of Sexual Orientation Discrimination under International Human Rights Law" (2016) 16 H.R.L.R. 613, 660–661). It should also be noted that the margin of appreciation and especially consensus analysis is a feature of Strasbourg jurisprudence that is not generally reproduced in the jurisprudence of other international human rights treaty bodies (at 641–643). For criticism of the Strasbourg Court's approach to same-sex marriage and the margin of appreciation, and its failure to give weight to the value of dignity in that context, see P. Laverack, "The indignity of exclusion: LGBT rights, human dignity and the living tree of human rights" (2019) 2 E.H.R.L.R. 172, 182.

[134] *Oliari v Italy* (2015) 65 E.H.R.R. 957 at [192] and *Orlandi v Italy* (App. No.26431/12), judgment of 14 December 2017 at [204] and [205]. See also the decision to declare *Ferguson* inadmissible (*Ferguson v United Kingdom* (App. No.8254/11), *http://blogs.law.columbia.edu /genderandsexualitylawblog/files/2013/01/Ferguson-v.-UK.pdf* [Accessed 21 April 2019]). At the time *Schalk* was decided only eight states of the Council of Europe allowed same-sex marriage (*Schalk v Austria* (2011) 53 E.H.R.R. 20 at [58]); see fn.94 above for the number of states that currently allow gay marriage. See further: F. Hamilton, "Same sex marriage, consensus, certainty and the European Court of Human Rights" (2018) 1 E.H.R.L.R. 33; P. Johnson, "Same Sex Marriage and Article 12 of the European Convention on Human Rights", in C. Ashford and A. Maine (eds), *Research Handbook on Gender, Sexuality and the Law* (Cheltenham: Edward Elgar Publishing, 2019); and P. Johnson and S. Falcetta "Sexual orientation discrimination and Article 3 of the European Convention on Human Rights: developing the protection of sexual minorities" (2018) 43(2) E.L. Rev. 167.

[135] *Orlandi v Italy* (App. No.26431/12), judgment of 14 December 2017.

[136] The Court hinted that that position could change as the consensus strengthens (at [204] and [205]).

[137] Dissenting Opinion of Judges Pejchal and Wojtyczek.

[138] See fnn.94 and 95 above.

[139] *Vallianatos v Greece* (2014) 59 E.H.R.R. 12.

[140] That was "not as private individuals entering into contracts under the ordinary law but on the basis of the legal rules governing civil unions": at [81].

noting that a trend was currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships.[141] Therefore, in assessing the proportionality of the means chosen with the aims pursued, the Court conceded only a narrow margin of appreciation to the state, finding as a result that proportionality demands under art.14 did not merely require that the measure chosen was in principle suitable to achieve the aim in question: it also had to be shown to be necessary, in order to achieve that aim, to exclude same-sex couples from the category of civil unions. Given that the scheme differentiated between same- and different-sex couples who did *not* have children, it was found that the government had failed to justify the difference in treatment since the goals it was seeking to attain did not *necessitate* excluding same-sex couples from the civil union scheme. Accordingly, a breach of art.14 read with art.8 was found.

In *Oliari v Italy*[142] the Court took a further and highly significant step: it was confronted with a situation resembling that in *Vallianatos* but in which *no* registered partnership scheme had been introduced, even for different-sex couples. Three same-sex couples complained under art.8 read alone or with art.14, that Italy did not allow them access to a legal framework for formalising their relationships in the form of either marriage or a registered partnership, so they were being discriminated against as a result of their sexual orientation. The Court decided the matter solely on the basis of the existence and scope of a positive obligation under art.8(1) to introduce registered partnerships for same-sex couples affording them a legal framework protecting and recognising their relationships.[143] The Court, however, did not decide to impose a positive obligation to introduce a new legislative framework largely on a basis of principle, founded on notions of the inherent value of such a framework for same-sex couples. Instead, it viewed the notion of "respect" for private and family life under art.8(1) as a flexible one, finding that the requirements denoted by the term would vary considerably from case to case.[144] It identified *two* localised factors in particular that influenced its findings as to those requirements. The first comprised the "conflict between the social reality of the applicants, who for the most part live their relationship openly in Italy, and the law, which gives them no official recognition".[145] The second concerned the "unheeded" calls of the Italian courts to introduce a legal framework[146] providing same-sex couples with such recognition.[147]

In determining the *scope* of the positive obligation, the Court considered the balance to be struck between the interests of the applicants and those of the community. The margin of appreciation conceded was not specified with any clarity, although impliedly it was narrowed due to the consensus among the Member States on the matter as regards the importance to be conceded to the ability of the individual to access a registered partnership: it noted that a "thin majority" of Member States (24 out of 47) had by mid-2015 already legislated to introduce forms of same-sex partnerships.[148] The Court noted the absence of a counter-vailing community interest put forward by the Italian Government, although providing access to a registered partnership related to the "core protection of the applicants as same-sex couples".[149] The

[141] "The trend emerging in the legal systems of the Council of Europe member states is clear: of the nineteen states which authorize some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples"; the Court further found "Nine member States provide for same-sex marriage. In addition, seventeen member States authorize some form of civil partnership for same-sex couples": at [91] and [92].

[142] *Oliari v Italy* (2015) 65 E.H.R.R. 957.

[143] The protection related, it was found, to central, not peripheral, needs of the applicants: at [169].

[144] "The notion of 'respect' is not clear-cut, especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case": at [161].

[145] At [173]. The Court found: "The statistics submitted indicate that there is amongst the Italian population a popular acceptance of homosexual couples, as well as popular support for their recognition and protection": at [181]. An Italian Bill establishing same-sex civil unions was approved by the senate's Judiciary Committee on 26 March 2015, but then stalled at the Committee stage.

[146] At [183]–[185].

[147] The Italian courts had found that same-sex unions should be protected as a form of social community under art.2 of the Italian Constitution, but that it was the role of the legislature to introduce a form of legal partnership covering such couples, not that of the judiciary: at [45].

[148] At [178]. The Court also took account of the global trend towards state recognition of same-sex unions. For further discussion, see: H. Fenwick and A. Hayward "Rejecting asymmetry of access to formal relationship statuses for same and different-sex couples at Strasbourg and domestically" (2017) 6 E.H.R.L.R 545; A. Hayward, "Same- sex Registered Partnerships—A Right to be Recognized?" (2016) 75 C.L.J 27; H. Fenwick, "Same sex unions at the Strasbourg Court in a divided Europe: calling the legitimacy of the Court into question?" (2016) 3 E.H.R.L.R. 249.

[149] At [177]–[178].

government merely relied on its margin in arguing that time was needed to achieve a "gradual maturation of a common view of the national community".[150] But the Court found that the margin would not cover that position, given that the Italian Constitutional Court had repeatedly called for a juridical recognition of the relevant rights and duties of same-sex unions, but the government had not responded;[151] the Court proceeded therefore to find a breach of art.8. The Court found the claim under art.12 inadmissible,[152] and declined to consider art.14, meaning that the discriminatory dimension of the Italian position failed to receive express recognition.[153] Had it also decided the case under art.14 that would have resulted in holding states to a stricter standard since art.8 requires only that states take steps to show *respect* for the right in question, while art.14 requires that states must *secure* the right. Therefore, the demands connoted by showing such respect are more flexible than those imposed under art.14.

Orlandi[154] later confirmed the findings in *Oliari* to the effect that the existence of the consensus on the matter of introducing same-sex partnerships would determine the width of the margin conceded, and also that the stance of national courts on the matter would be relevant to the scope of the positive obligation recognised. In *Orlandi* the applicants had contracted same-sex marriages abroad and sought to register their "foreign" marriages upon return to Italy, but their applications were all rejected, following domestic law at the time. The Court reaffirmed the *Oliari* principle in finding under art.8 that same-sex couples have a right to be legally recognised and protected by the Member State, and that such recognition and protection would be realised if they could register their foreign marriages as registered partnerships (civil unions) since that would provide the applicants with "the opportunity to obtain a legal status equal or similar to marriage in many respects".[155] The Court considered whether a breach of art.8 had arisen since the applicants had been left in a "legal vacuum and devoid of any protection"[156] prior to the coming into force of the legislation responding to *Oliari*.[157] The majority found under art.8(1) that the key issue concerned the balancing of competing interests as between the applicants and the community;[158] it was scrutinised closely since a narrow margin of appreciation only was conceded due to the consensus, the Court reiterating that a thin majority of Member States had already introduced forms of registered partnerships for same-sex couples. On that basis it was found that Italy had failed to strike a fair balance between the interests in question and had therefore breached art.8. Given that finding, the Court once again decided that it was not necessary to consider art.14.

The judgments of the dissenting judges in *Orlandi* (Judge Wojtyczek from Poland and Judge Pejchal from the Czech Republic) may arguably be viewed as indicative of the negative stance taken as to formal recognition of same-sex unions in the legislatures of some "Eastern" Member States. The two judges found that there was an ECHR basis for protecting marriage between a man and a woman because so doing would "protect the best interests of children and, especially, ensure a stable family environment", but they found no positive obligation to provide "*specific legal frameworks providing for the recognition and protection of their unions*", be they different- or same-sex couples. They considered that the "matter belongs to the exclusive domestic jurisdiction of the High Contracting Parties".[159]

[150] That was based on the varying views on the issue expressed, in recognising "this new form of family": at [176].

[151] At [185].

[152] The couples' claims under art.12 in respect of access to marriage were found to be manifestly ill-founded (at [194]), following the Court's established stance on that matter, based mainly on the lack of a consensus among the Member States as to the introduction of same-sex marriage following the findings in *Hämäläinen v Finland* (App. No.37359/09), judgment of 16 July 2014 at [74].

[153] At [188].

[154] *Orlandi v Italy* (App. No.26431/12), judgment of 14 December 2017.

[155] At [194].

[156] At [196].

[157] The civil union law in Italy took effect on 5 June 2016; the first civil union took place on 24 July 2016.

[158] *Orlandi v Italy* (App. No.26431/12), judgment of 14 December 2017 at [198].

[159] Paragraph 4 of the joint dissenting judgment. Italics in original. This dissent has been strongly criticised for being heteronormative and homophobic: C. Popplewell-Scevak, "Oliari, Orlandi and Homophobic Dissenting Opinions: The Strasbourg Approach to the recognition of same sex marriages" (2 February 2018), *Strasbourg Observers*, *https://strasbourgobservers.com/2018/02/02/oliari-orlandi-and-homophobic-dissenting-opinions-the-strasbourg-approach-to-the-recognition-of-same-sex-marriages/* [Accessed 23 May 2019]; S. Falcetta "Critical consideration of the 'disturbing' views

The reliance on consensus analysis in *Oliari* and *Orlandi*, and the reluctance to acknowledge the discriminatory aspect of the situation, were also significant features of the decision in *Aldeguer Tomás v Spain*.[160] The Court considered a claim for a survivor's benefits, brought by an unmarried same-sex partner before the introduction of same-sex marriage in Spain, under art.14 read with both art.8 and art.1, Protocol 1.[161] The Court decided that the applicant survivor was *not* in a relevantly comparable situation to that of a non-married partner in a heterosexual relationship due to the exceptional circumstances pertaining to the surviving heterosexual partner. But the Court failed to identify the obvious comparator—a surviving partner after the death of a spouse, who would have been able to claim the benefit in question. Clearly, the applicant could not claim it since at the time he was barred from marrying his partner. The Court further found that due to the lack of a consensus at the time in question (prior to 2002 when the applicant's partner had died) the Spanish legislature was within its margin of appreciation in failing to introduce the legislation relating to same-sex marriage earlier.[162] That stance could again be compared with the bolder one of the Inter-American Court of Human Rights on the same issue.[163]

In the same-sex family reunification cases the Strasbourg Court has, however, recently shown some willingness to recognise the discriminatory dimension of the situation. In the important decision in *Pajić v Croatia*[164] the Court found that sexual orientation discrimination in immigration law preventing family reunification of same-sex couples violates art.14 read with art.8. Similarly, in *Taddeucci and McCall v Italy*[165] a partner in a same-sex relationship, a non-EU citizen, was not able to remain in Italy but would have been able to remain if able to marry his partner; the Strasbourg Court again found a breach of art.14 read with art.8.

Applying Vallianatos, Pajić and Oliari in certain "Eastern" Member States

Vallianatos and *Oliari* found that the ECHR includes a right to a registered partnership for same-sex couples in *certain* circumstances, but Strasbourg's reluctance to declare such a *clear*, generally applicable right is partly due to the weak consensus and also, possibly, to its concerns as to the reception such a declaration might have in some "Eastern" Member States if applications from them were encouraged and were then successful.[166] But Lithuania provides a pertinent example of a state in which *Vallianatos* could

of ECHR Judges Pejchal and Wojtyczek on same sex relationships" (16 December 2017), *http://echrso.blogspot.com/2017/12/critical-consideration-of-disturbing.html* [Accessed 23 May 2019].

[160] *Aldeguer Tomás v Spain* (2017) 65 E.H.R.R. 24. Under art.14 the Court considered a comparison with a partner from a stable, non-married, heterosexual relationship, who had not been able to marry his or her partner since one of them was still married and had not obtained a divorce before the relevant legislation on divorce had been introduced (in 1981), but by way of a special exception had nonetheless been found to be entitled to a survivor's pension. The Court decided that the comparison did not apply, so art.14 was not found to be breached.

[161] The Court reiterated that the notion of family life "not only includes dimensions of a purely social, moral or cultural nature but also encompasses material interests": at [72].

[162] It did not need to do so "at an earlier date which would have entitled the applicant to obtain the benefit of a survivor's pension": at [101].

[163] In the decision in the Inter-American Court of Human Rights in *Duque v Colombia* IACtHR Series C, 310 (2016), which concerned the lack of survivor's pension rights for gay couples, the Court found a violation of art.24 (right to equal protection) in conjunction with art.1(1) (obligation to respect rights) without reference to consensus analysis. See also fn.133 above. Compare also the approach in *Re McLaughlin's Application for Judicial Review* [2018] UKSC 48.

[164] *Pajić v Croatia* (2018) 67 E.H.R.R. 12.

[165] *Taddeucci and McCall v Italy* (App. No.51362/09), judgment of 30 June 2016.

[166] The Court is likely to be concerned as to the reception of such judgments in certain "Eastern" states offering no official protection to or acknowledgement of same-sex unions, and resistant to doing so—see fn.97 above—and especially Moldova, Ukraine, Russia, Turkey, Georgia, Azerbaijan, Armenia. Such states have also failed to implement a number of judgments, such as Russia, which in 2017 had by a large margin the greatest number of judgments that had not been implemented in over five years (Russia had 150, followed by Turkey (116), Ukraine (86), Moldova (58): see Committee of Ministers, "Length of the execution process—pending cases—State by State" (2018), *https://rm.coe.int/5-length-of-the-execution-process-pending-state-by-state-eng/16807b91b5* [Accessed 23 May 2019]); see also Committee of Ministers, "Main States with cases under enhanced supervision" (2018), *https://rm.coe.int/5-main-states-with-cases-under-enhanced-supervision-2017-eng/16807b8a77* [Accessed 23 May 2019]. Further, in 2017 the Russian federation withheld its annual contribution to the Council of Europe in response to sanctions imposed by the Council of Europe against it in 2014, and it also threatened to withdraw from the ECHR (T. Robinson and B. Smith, "Russia and the Council of Europe" (CDP 2018-0179 13 July 2018); Council of Europe, "PACE proposes new 'joint reaction procedure' when a state violates its statutory obligations" (10 April 2019), *https://www.coe.int/en/web/portal/-/pace-proposes-new-joint-reaction-procedure-when-a-state-violates-its-statutory-obligations* [Accessed 23 May 2019]). In 2015 the Russian Constitutional Court was granted the power to review international human rights rulings to decide whether they violate the Russian Constitution and are therefore "non-executable". See for discussion R.M. Fleig-Goldstein, "The Russian Constitutional Court versus the

be relevant in future. It considered a registered partnership Bill in 2015; a number of members of the government were opposed, however, to including same-sex couples in the legislation,[167] and it was partly due to the concern that they would eventually have to be included that the Bill was dropped. However, in 2016 it was successfully reintroduced, although only for different-sex couples, precisely replicating the situation in Greece addressed in *Vallianatos*.[168] But if same-sex couples continue to be excluded,[169] the *Vallianatos* principle would apply, regardless—it would appear—of satisfying the two *Oliari* factors[170] since they were not mentioned in *Vallianatos*. The Court appeared to consider in *Vallianatos* that including same-sex couples in an existing partnership scheme was less controversial than imposing a positive obligation on a state to introduce a completely new scheme. It appears to follow, since Lithuania already has a registered partnership scheme for different-sex couples, that the stance of the Lithuanian courts as regards such schemes (the second *Oliari* factor—eterminations of the higher courts favouring same-sex registered partnerships) would not appear to be pivotal if a claim for a registered partnership was brought by a Lithuanian same-sex couple at Strasbourg. Nor would a finding of a discordance in Lithuania (the first factor) between social reality and the law in terms of the lived experience of same-sex couples, a discordance that probably would not be apparent.[171]

But the position might differ as regards applications from those "Eastern" states where the *only* means of formalising a relationship is marriage, from which same-sex couples are excluded. After *Oliari* if an application was brought in the near future against such a state in which the first and/or second of the factors identified in *Oliari* were *not* present, then the Court might, it appears, place restraint on the scope of a positive obligation under art.8(1) to introduce such partnerships.[172] A same-sex couple considering bringing an application from such a state, aware that those two factors would not apply in that state, might therefore be deterred from proceeding since they would anticipate that an application could prove futile,[173]

European Court of Human Rights: How the Strasbourg Court Should Respond to Russia's Refusal to Execute ECtHR Judgments" (2017) 56 *Columbia Journal of Transnational Law* 172. The article argues that the Strasbourg Court and the Council of Europe face "significant enforcement problems regarding Russia" stemming from "Russia's resistance towards implementing Strasbourg judgments". It focuses in particular on the rulings of the Russian Constitutional Court that it is impossible to execute the Court's final judgment in the case of *Anchugov and Gladkov v Russia* (App. No.11157/04), judgment of 9 December 2013 and *OAO Neftyanaya Kompaniya Yukos v Russia* (2012) 54 E.H.R.R. 19, on the basis that they violate the Russian Constitution. A similar problem may arise in Turkey as far as the *executive* is concerned: in 2018 the Turkish President, Recep Tayyip Erdoğan, rejected the decision at Strasbourg calling for the release of Selahattin Demirtas, a Turkish MP: "The decisions delivered by Strasbourg do not bind us …" Erdoğan was quoted as saying on 20 November 2018 by the state-run Anadolu Agency (C. Candar, "Have relations between Turkey and Europe reached a turning point?" (21 November 2018) *AL-Monitor*, *https://www.al-monitor.com/pulse/originals/2018/11/turkey-turning-point-in-ties-between-ankara-and-eu.html* [Accessed 23 May 2019]); see also Council of Europe, "Country Factsheet: Turkey" (2018), *http://rm.coe.int/tur-eng-fs4/1680709767* [Accessed 23 May 2019].

[167] The members of government included the Justice Minister: see Human Rights Watch, "Letter to the Lithuanian Minister of Justice Regarding Equal Rights in Relationship Legislation" (11 June 2015), *https://www.hrw.org/news/2015/06/10/human-rights-watch-letter-lithuanian-minister-justice-regarding-equal-rights* [Accessed 23 May 2019]. The opposition was apparently not on the basis that the legislation was intended only to protect traditional families, but because the government considered that same-sex couples would be such a tiny minority that a new framework was not needed.

[168] In 2016 the Lithuanian Parliament voted upon a constitutional amendment that would limit the definition of "family life" to exclude same-sex partners; on 11 August 2016 the government gave approval to the changes proposed by the Ministry of Justice of Lithuania to the Civil Code of Lithuania which would legalise civil partnership for opposite-sex couples and further exclude same-sex couples from legal recognition of same-sex relationships: National LGBT* Rights Organization LGL, "'We Are People, Not Propaganda': Situation of LGBTI People in Lithuania: submission to the 123rd Session of the Human Rights Committee Review of the Forth Periodic Report of Lithuania (LOIPR)" *https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LTU/INT_CCPR_NGO_LTU_31394_E.pdf* [Accessed 23 May 2019].

[169] In 2019 it appears that same-sex couples could soon be included in the partnership scheme in Lithuania. The Prime Minister of Lithuania chose Valentine's Day to solicit political support for same-sex couples. T. Bellamy-Walker, "Lithuanian Prime Minister Wants Same Sex Partnerships Law" (15 February 2018), *Daily Beast*, *https://www.thedailybeast.com/lithuanian-prime-minister-wants-same-sex-partnerships-law* [Accessed 23 May 2019]. Prime Minister Saulius Skvernelis used an LGBT rights rally in the capital of Vilnius to call on the Lithuanian parliament, the Seimas, to pass amendments for creating basic regulation for same-sex partnerships, which included property protections as "sufficient regulation at least at this stage".

[170] See text to fnn.145 and 146 above for the two factors.

[171] An EU-wide survey conducted by the EU Agency of Fundamental Rights in 2013 revealed that 61% of Lithuanian LGBT people who participated in the survey felt discriminated against or harassed in the last 12 months because of their sexual orientation: "Survey on fundamental rights of lesbian, gay, bisexual and transgender people in EU" (2012), *https://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-fundamental-rights-lesbian-gay-bisexual-and* [Accessed 23 May 2019]. See also the Pew Research Global Attitudes Project: Pew Research Center, "Global Acceptance of Homosexuality" (3 June 2013), *http://www.pewglobal.org/2013/06/04/global-acceptance-of-homosexuality/* [Accessed 23 May 2019].

[172] See the Concurring Opinion in *Oliari* of Judges Mahoney, Tsotsoria and Vehabović which found a violation of art.8 but on narrow reasoning expressly limited only to the situation in Italy.

[173] But even if such a claim was not brought or failed, a same-sex couple could seek to rely instead on *Schalk v Austria* (2011) 53 E.H.R.R. 20, which did *not* refer to the factors in question, to claim at least some state protection for their relationship as constituting a form of "family life".

despite the hopes that the decision in *Oliari* raised among LGBT or human rights groups[174] in some Member States.

Those considerations may in part explain why, so far, only one claim broadly analogous to that in *Oliari* has been brought from any "Eastern" state providing no specific framework creating protection for same-sex unions,[175] although a challenge from Poland may be at an early stage.[176] The implications of *Oliari* may soon be considered in respect of that claim, in *Fedotova and Shipitko v Russia*.[177] Three same-sex couples are claiming a right to a same-sex registered partnership in Russia, under arts 8 and 14, on the basis that only one form of formalisation of relationships is available in Russia—marriage—which is not open to same-sex couples. Clearly, the key stumbling block for the claim, based on the discussion above, is that the Court in *Oliari* in the face of a weak consensus referred to a discordance between social reality in Italy and the legal position as to formalisation of a same-sex union, as determinative of the reach of positive obligations under art.8(1), based on the requirements of demonstrating *respect* for private and family life. So it accorded to itself the possibility, where such discordance did not exist, or did not exist to the same extent in a Member State, of avoiding a finding that the article had been breached. Such a discordance would clearly be unlikely to be discerned in Russia where it would be much harder for a same-sex partnership to live openly as a couple since a much higher percentage of the population is opposed to recognition of same-sex unions than in Italy.[178] As to the second factor from *Oliari*, the registrar and Russian courts dismissed the applicants' claims,[179] and so their stance affirms the state's rejection of the introduction of registered partnerships for same-sex couples. Strasbourg therefore could take the view that introduction of such partnerships is not required to demonstrate "respect" for family life in a state in which those two relevant factors are not present. The second factor would also be relevant to the balance to be struck between the interests of the community and those of the applicants. The Court might therefore find that since a strong consensus on this matter is not apparent, the positive obligation recognised under art.8(1) in *Oliari* should not be recognised against Russia, meaning that Russia at present could be found to have remained within its margin of appreciation in failing to provide a same-sex partnership scheme.

The resistance in certain states to allowing family reunification of same-sex couples could be addressed at Strasbourg following *Pajić*, and the decision also places pressure on Member States to introduce some recognition of foreign same-sex marriages. If an ECHR Member State is also a member of the EU, the position as to such family reunification is now clear. In 2018, in a significant and robust judgment, the European Court of Justice ruled that all EU states that do not allow same-sex marriage or registered partnerships[180] must nevertheless legally recognise such unions for the purposes of immigration of the

[174] See, e.g. M. Adutaviciute, "After Oliari partnership debate in Lithuania gets serious" (12 August 2015), *Liberties*, *https://www.liberties.eu/en /news/partnership-debate-lithuania/4728* [Accessed 23 May 2019].

[175] See *Kozak v Poland* (2010) 51 E.H.R.R. 16, which is significant but only referred to housing tenancy rights.

[176] See A. Walendzik, "Breakthrough on the way to introduce civil partnerships? Homosexual couples file a lawsuit to the Tribunal in Strasbourg" (30 March 2017), *Newsweek Poland*, *http://www.newsweek.pl/polska/spoleczenstwo/homoseksualne-pary-zaskarzyly-polske-do-trybunalu-w -strasburgu,artykuly,407947,1.html* [Accessed 23 May 2019].

[177] *Fedotova and Shipitko v Russia* (App. No.40792/10), communicated on 2 May 2016. The claim has reached the facts and questions stage. All three couples declared their intention to marry and applied on a number of occasions unsuccessfully to the Register Office locally to have their marriages registered. The requests were dismissed by reference to art.1 of the Russian Family Code, which states that the regulation of family relationships is based on "the principle of a voluntary marital union between a man and a woman". Unsurprisingly, given Strasbourg's current stance on same-sex marriage under art.12, the claims are being brought under arts 8 and 14 only, for a means of formalising the couples' relationships in Russia via a form of registered partnership.

[178] In a 2018 study, Pew Research Center found that 90% of Russians opposed same-sex marriage, compared to 38% of Italians: "Eastern and Western Europeans Differ on Importance of Religion, views of minorities and Key Social issues" (29 October 2018), *http://www.pewforum.org/2018/10/29 /eastern-and-western-europeans-differ-on-importance-of-religion-views-of-minorities-and-key-social-issues* [Accessed 23 May 2019] p.12. The mismatch between social reality and law found in Italy in *Oliari* is also far less apparent in a number of other "Eastern European" states according to the Pew survey—in almost all Eastern European countries more than half of the population opposed gay marriage (other than the Czech Republic (29% opposed) and the Slovak Republic (47% opposed)) while in Western European countries, other than Italy, more than 70% of the population supported gay marriage.

[179] Their subsequent challenges to the Register Office's decisions in the domestic courts were unsuccessful on the basis of art.1 of the Russian Family Code.

[180] That covers Romania, Poland, the Slovak Republic, Bulgaria, Lithuania and Latvia.

spouse/partner, and grant same-sex couples in which one partner is an EU citizen full residency rights.[181] So Member States that are also members of the EU must recognise the immigration rights of same-sex spouses under marriage or registered partnership. But non-EU Member States obviously do not need to do so as a matter of EU law, and some attempts to achieve such recognition have failed. Following *Pajić*, however, Member States that fail to recognise same-sex marriages contracted abroad would expect to be in breach of arts 8 and 14 of the ECHR.[182]

The future spread of same-sex registered partnerships and the fate of future Strasbourg claims

Post-*Oliari*, same-sex registered partnerships may spread further across the Member States, barring the most intransigent ones. As mentioned above, a number of the "Eastern" states have already considered the introduction of same-sex registered partnership schemes in future. While a number of them include bars in their Constitutions to same-sex marriage,[183] their Constitutions usually, not invariably,[184] also include provisions on non-discrimination.[185] Domestic courts could therefore find that they require the introduction of same-sex registered partnerships, but not necessarily marriage, in an effort to avoid perpetuating discrimination based straightforwardly on sexual orientation, although such interpretations would not be firmly rooted in the developing Strasbourg jurisprudence discussed here, given that the Court in both *Oliari* and *Orlandi* avoided a finding of a breach under art.14.

If over the next few years same-sex registered partnership schemes spread further across Member States, so that the relevant consensus strengthens, the margin of appreciation accorded to states that fail to introduce such a scheme would be expected to narrow further. As regards the timing of legislative change—in *Aldeguer Tomás v Spain*[186] the Court found, referring to *Schalk*: "States enjoyed a margin of appreciation as regards the timing of the introduction of legislative changes in the field of legal recognition of same-sex couples, an area which was regarded as one of evolving rights with no established consensus".[187] Based on the lack of a consensus at the time, the Court emphasised that Spain could not be criticised for failing to introduce the legislation earlier.[188] But in the face of a *stronger* consensus, Strasbourg would reject that argument and would also probably be prepared to find that the positive obligation recognised under art.8

[181] *Relu Adrian Coman v Inspectoratul General pentru Imigr□ri* (C-673/16), 5 June 2018. See for discussion P. Dunne, "Coman: Vindicating the Residence Rights of Same-Sex 'Spouses' in the EU" [2018] 4 E.H.R.L.R. 383. The case has been used in a Bulgarian court to back the right of a foreign same-sex couple to have their relationship status recognised in Bulgaria: see Y. Stanev, "ECJ ruling ensures some rights for same sex spouses across emerging Europe" (21 July 2018) *Emerging Europe*, *https://emerging-europe.com/news/ecj-ruling-ensures-some-rights-for-same-sex-spouses-across-emerging-europe/* [Accessed 23 May 2019].

[182] See also *Taddeucci and McCall v Italy* (App. No.51362/09), judgment of 30 June 2016, considered above.

[183] See fn.98 above.

[184] The Moldovan Constitution, art.16 of which protects "Equality", does not protect it on the ground of sexual orientation. While that is not conclusive, it has influenced the lack of protection on this ground, see V. Turcanu-Spatari, "Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity Legal Report: Moldova" (The Danish Institute of Human Rights, 2010), *https://www.coe.int/t/Commissioner/Source/LGBT/MoldovaLegal_E.pdf* [Accessed 23 May 2019]. The study finds: the overall legal framework of the Republic of Moldova does not define the terms of discrimination, sexual orientation and gender identity; and it does not provide mechanisms of redressing discrimination (at para.4). The Ukraine Constitution also does not provide such protection (art.24) and also defines marriage as between a man and a woman (art.51).

[185] For example, in 2009 the Slovenian Constitutional Court found that art.22 of the Registration of Same Sex Partnerships Act (RSSPA) violated the right to non-discrimination under art.14 of the Constitution on the ground of sexual orientation, and required that the legislature remedy the established inconsistency within six months: U-I-425/06; see also Equal Rights Trust, "Constitutional Court of Slovenia Upholds Equal Rights for Same Sex Partners" (20 July 2009), *http://www.equalrightstrust.org/news/constitutional-court-slovenia-upholds-equal-rights-same-sex-partners* [Accessed 23 May 2019]. While Poland's Constitution bars same-sex marriage, its Constitutional provisions on non-discrimination arguably mandate the introduction of a same-sex registered partnership law. The Bosnian Constitution (art.II) protects the human rights and fundamental freedoms it lists by defining them through the "Enumeration of Rights" (art.II, 3), stating that the enjoyment of the rights and freedoms is secured to all persons in Bosnia and Herzegovina without discrimination on any grounds ("Non-Discrimination", art.II, 4), and states that the ECHR has supremacy over all other law in Bosnia and Herzegovina. See also in relation to Georgia, which recently added an amendment to its constitution to exclude same-sex relationships from the definition of marriage, the suggestion by the Venice Commission that such an amendment was contrary to art.14 of the Constitution which provides a basis for "limiting the constitutional amendments, which aims to restrict the people's constitutional rights and freedoms …": "Report On Constitutional Amendment, Adopted by the Venice Commission at its 81st Plenary Session" (Venice, 11–12 December 2009), para.75.

[186] *Aldeguer Tomás v Spain* (2017) 65 E.H.R.R. 24.

[187] At [90].

[188] "The Spanish legislature cannot be criticised [under the ECHR] for not having introduced the… legislation at an earlier date": at [90].

in *Oliari*,[189] should be extended to Member States where one or both of the particular local factors present in Italy were not present.[190]

(6) Majoritarian influences on consensus analysis in the recent sexual minority rights' jurisprudence

The tendencies towards "East"/"West" divisions identified place the Court in a somewhat sensitive position. While the principle is soon to be reinforced[191]—that the Court's protection for the Convention rights is subsidiary to the protection provided by the state—reliance on the Court is still required to protect vulnerable minorities who fail to receive protection for their Convention rights domestically, including in the domestic courts.[192] As the Court pointed out in this context in *Alekseyev v Russia*, the exercise of Convention rights by a sexual minority in a particular state cannot depend on their acceptance by the majority.[193] But reliance on consensus analysis as linked to the width or narrowness of the margin of appreciation conceded to a state has the capacity to allow popular opinion in a number of Member States to affect the protection offered to sexual minorities adversely.[194] As this article has sought to demonstrate, if a substantial majority of states provide legal protection for such minorities, the Court will be emboldened to follow suit, conceding a narrow margin of appreciation to the state and tending to find a violation, as in the first two categories of cases. But where the consensus is weaker *and* policy considerations point towards a less robust approach, the Court may take a more restrained stance, as in *Oliari*.

The use of consensus analysis sits uncomfortably, especially in this context, with the Court's approach to protecting minorities and especially to the relevance of majority values in a single state: *Bayev* establishes that majoritarian support in the state in question should not be relied on to narrow down the scope of the substantive protection of a Convention guarantee, whereas it could enable that scope to be broadened.[195] That could be seen as consistent with the findings in *Oliari* since the wider ambit ascribed to art.8 in that instance was found to encompass acceptance of a positive obligation to introduce same-sex registered partnerships, due to popular support for such an innovation in Italy. But, conversely, as discussed, *lack* of such support in some "Eastern" states could argue for a more restrained ambit, as accepted via the first factor found relevant to the notion of "respect" in *Oliari*, but contrary to the findings on the point in *Bayev*.[196]

[189] *Oliari v Italy* (2017) 65 E.H.R.R. 26 at [185].

[190] Courts in some other Eastern states would not be likely to favour formal recognition of same-sex unions. For example, the Association of Polish Judges and the Cooperation Forum of Judges in Poland have issued a resolution declaring that a draft Bill on civil partnership would be unconstitutional (15 June 2018): "Position of the 'Iustitia' Association of Polish Judges and 'THEMIS' Association of Judges and the Cooperation Forum of Judges on the new National Council of the Judiciary" (17 November 2018), *https://www.aeaj.org/media/files/2018-11-17-92-Position-Polish%20Judges%20Association.pdf* [Accessed 23 May 2019], fn.20. In 2015 the Court of Appeal upheld a registry office's decision to refuse to recognise the same-sex marriage of a Polish citizen married in Spain on the basis that such recognition would be contrary to the constitution: ILGA-Europe, "Annual Review 2016", p.131; Polish Society of Antidiscrimination Law, Lambda Warsaw, Campaign Against Homophobia, Trans-Fuzja Foundation and The Diversity Workshop, "Information paper on LGBTI discrimination for The European Commission Against Racism and Intolerance" (April 2014), *https://www.spr.org.pl/app/download/8689107794/LGBT_Raport+FINAL.pdf* [Accessed 23 May 2019].

[191] See fn.13 above referring to the Declarations over the last few years and to Protocol 15.

[192] The Court's jurisprudence has had, or has sought to have, a very significant impact on sexual orientation discrimination in general as discussed in Sections 3–5, and in particular see fn.2 above and *L v Austria* (2003) 36 E.H.R.R. 55; *Alekseyev v RussiaAlekseyev v Russia* (App. No.4916/07), judgment of 21 October 2010; *Bączkowski v Poland* (2009) 48 E.H.R.R. 19.

[193] *Alekseyev v Russia* (App. No.4916/07), judgment of 21 October 2010, discussed above, text to fn.88. At [81] the Court found: "… it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical …".

[194] See also D. McGoldrick, "The Development and Status of Sexual Orientation Discrimination under International Human Rights Law" (2016) 16 H.R.L.R. 613, 666.

[195] *Bayev v Russia* (App. No.67667/09), judgment of 20 June 2017 at [70].

[196] See the comment on this matter, echoing *Bayev v Russia* (App. No.67667/09), judgment of 20 June 2017, on behalf of the applicants in *Oliari*: "empirical evidence (submitted to the Court) showed that lack of recognition of same-sex couples in a given state corresponded to a lower degree of social acceptance of homosexuality. It followed that by simply deferring normative choices to the national authorities, the Court would fail to take account of the fact that certain national choices were in fact based on prevailing discriminatory attitudes against homosexuals": *Oliari v Italy* (2015) 65 E.H.R.R. 957 at [113].

The consensus doctrine can be viewed as providing a key to the differences in the approach of the Court in the three categories of sexual minority cases considered, as is indicated by a crude tallying of numbers of states taking various stances on the issues discussed within those categories. No Member State has enshrined acceptability of assaults on homosexuals/bisexuals in law, in contrast to, for example, Saudi Arabia or Iran in which state murder of homosexuals is embodied in Sharia law, part of the legal system in those states.[197] Assaults on persons belonging to sexual minorities by state-[198] or non-state actors occur, especially in certain "Eastern" states, as discussed in Sections 2 and 3, but are not *overtly* condoned in the laws of any Member State, and in some assaults or threats are designated aggravated offences when motivated by the victim's sexual orientation.[199] Therefore, the unanimous consensus on the matter reinforces the Court's determination to find a state in breach of the relevant articles, in particular of art.3, in relation to cases in the first category. The position is fairly similar as regards cases in the second category. Only a small minority of states have introduced provisions that might be termed "anti-gay propaganda" laws, or the equivalent,[200] somewhat similar to the infamous repealed s.28 in the UK.[201] As discussed in Section 4, a small number of "Eastern" states have recently introduced similar laws, but in a number of them they have been proposed but not enacted.[202] Therefore, a strong consensus bolsters a robust approach by the Court to such laws, under arts 10 and 14, the approach which was taken in *Bayev v Russia*.

The role of the Court in the first two categories of cases considered may therefore be contrasted strongly with its role in the third in terms of providing ECHR protection for sexual minorities in the Member States. It would be expected that the Court's approach in those three categories of cases would differ since in the third it is dealing with a positive obligation based on *respecting* the right in question. But that is not the only difference: as discussed, so far only a thin majority of the Member States have introduced state formalisations of same-sex unions.[203] It might therefore be concluded that since there is a narrow consensus on the matter, which may strengthen, the Court would concede a narrow margin of appreciation only to a non-compliant state if a same-sex couple claimed a right to a registered partnership under art.8 read alone or with art.14. But at present that is open to doubt—the weak consensus appears to be viewed by the Court as affording it some leeway to avoid finding that the positive obligation recognised in *Oliari* to introduce same-sex registered partnerships clearly extends to all Member States. That may also explain the failures in this third category of cases to recognise the discriminatory dimension of failing to afford same-sex couples access to formalisations of their relationships.[204] Equally, until there is a consensus on same-sex marriage the Court has demonstrated that it will not recognise a right to contract such a marriage under art.12 read with art.14.[205]

The Court has accepted that a lack of state protection and recognition of same-sex relationships relates to an especially intimate aspect of private and family life; it has already found that the availability of same-sex registered partnerships relates to "core" interests of same-sex couples, and to "facets of an

[197] Homosexuality was made a capital offence in Iran after the Islamic revolution of 1979, although the exact incidence of executions is hard to track, given the lack of a free media. No state in the ECHR bases the national law upon sharia in the manner that Saudi Arabia or Iran have done, but in Turkey and Azerbaijan there are movements to strengthen the role of Sharia law: S. Cagaptay, "In long-secular Turkey sharia is gradually taking over" (16 February 2018), *Washington Post*, *https://www.washingtonpost.com/news/democracy-post/wp/2018/02/16/in-long-secular-turkey-sharia-is-gradually-taking-over/* [Accessed 23 May 2019]; A. Valiyev, "Isamic movements in Azerbaijan" (17 May 2018), *http://mesbar.org/islamic-movements-in-azerbaijan* [Accessed 23 May 2019].

[198] Such assaults do, however, occur: see e.g. "Azerbaijan police snatched gay men in Baku, beat them, and subjected them to forced medical exams" (19 October 2018), *Euobserver*, *https://euobserver.com/justice/141831* [Accessed 23 May 2019]. See also fn.28 above as regards violence perpetrated against sexual minorities in Chechnya.

[199] See fn.43 above. The Court's recent findings of art.3 and art.14 violations in that first category of cases could prompt Member States which have not already done so to consider making provision for aggravation of offences where they are motivated by hatred on grounds of sexual orientation.

[200] See fn.83 above.

[201] Section 28 of the Local Government Act 1988.

[202] See fn.83 above in relation to Azerbaijan, Armenia, Romania, Lithuania, Moldova, Poland and Ukraine.

[203] See fnn.94 and 95 above for states which have introduced such schemes.

[204] As in *Orlandi v Italy* (App. No.26431/12), judgment of 14 December 2017 and *Oliari v Italy* (2015) 65 E.H.R.R. 957 in contrast to *MC and AC v Romania* (App. No.12060/12), judgment of 12 April 2016 and *Bayev v Russia* (App. No.67667/09), judgment of 20 June 2017.

[205] See fn.134 above and see further F. Hamilton, "Same sex marriage, consensus, certainty and the European Court of Human Rights" [2018] 1 E.H.R.L.R. 33.

individual's existence and identity".[206] So in a state in which there is no or little discordance between social reality and the law, or no acceptance of the argument for such partnerships by the domestic courts due to the climate of homophobia, the risk of acquiescing to prejudice against sexual minorities would be expected to lead the Court eventually to rely on a strengthened European consensus to find that an "outlier" state had over-stepped its narrowed margin of appreciation. Eventually, but only on the basis of consensus, it seems inevitable that it will find that art.12 covers same-sex marriage. Clearly, at present its willingness to open non-traditional institutions for formalising relationships in the form of registered partnerships to same-sex couples must be contrasted with its reluctance to open the traditional institution of marriage to such couples under art.12. On the basis of consensus analysis influencing the application of the margin of appreciation it appears to defer to tradition in a way that it has deemed impermissible when considering other wrongs against sexual minorities.

(7) Conclusions

The current approach of the Strasbourg Court in this context shows tensions between two conflicting demands: it is seeking both to protect sexual minorities, and also its own authority, by avoiding determinations, especially as to same-sex marriage, likely to lead to open conflict with certain "Eastern" states. So, in the consensus-based contexts, explored in Sections 3 and 4, as prejudice against sexual minorities became more apparent in some "Eastern" Member States, the Court evinced a greater determination to provide protection for such minorities than it did in its earlier "gay rights" jurisprudence. But, in strong contrast, in the context of formalisations of same-sex relationships, there are signs that East/West divisions are having some inhibitory impact on its judgments. While eschewing reliance on majoritarianism in a single state, it is allowing popular opinion in certain Member States, via the influence of consensus analysis on application of the margin of appreciation, to determine its stance on same-sex marriage, and to an extent on same-sex registered partnerships. Its somewhat muted, deferential stance does not adhere to the doctrine of subsidiarity where protections for same-sex unions are not available domestically; instead, it appears, under the banner of the margin conceded, that the Court is seeking to preserve its legitimacy and authority which might be threatened if certain states especially hostile to the interests of sexual minorities merely disregarded its judgments.[207] So as regards same-sex registered partnerships, reliance on the two *Oliari* factors in the face of a weak consensus arguably reflects policy-based concerns as to the stances of such states on this issue, while the Court has failed to support same-sex marriage due to the lack of consensus on the matter, fuelled by popular prejudice in a number of states. Such prejudice against sexual minorities and lack of protection for them in the domestic courts finds parallels in those two features of the Nazi regime in its early anti-Semitic phase.[208] So that position exacerbates the need for the protection of the ECHR since it was precisely intended to prevent recurrence of situations such as the one which arose in Germany.

So what is the way forward in the face of the competing imperatives that Strasbourg should maintain its authority—at least in the sense that its judgments are usually accepted in the Member States—but at the same time protect the interests of sexual minorities, as part of its core mission? It is tempting to find that the Court should take a stance as to protecting such minorities reminiscent of the bold, trail-blazing stance of the Inter-American Court of Human Rights, or the ECJ, but that would reflect a failure to appreciate the differences between the positions of those Courts and that of Strasbourg.[209] So finding would ignore the deep divisions on this issue between Member States, and the resistance to "Western" values in

[206] *Oliari v Italy* (2015) 65 E.H.R.R. 957 at [177]; *Orlandi v Italy* (App. No.26431/12), judgment of 14 December 2017 at [206].
[207] See also fn.166 above.
[208] Those two aspects of the treatment of Jews in Nazi Germany in that phase were predicated on a concept of state sovereignty untrammelled by outside intervention; their treatment was one reason for the inception of the ECHR, founded centrally on rejection of the idea that adverse treatment of minorities within a state is a matter for a state to judge for itself. See also fn.11 above.
[209] See fn.132 above.

certain "Eastern" states, as discussed here. It would disregard the basis for adoption of the devices the Court has relied on, especially consensus analysis, to avoid a too overt and sustained flouting of its rulings by certain Member States.[210] So, unpalatably, it is not concluded that its reliance on those devices in this context should simply be abandoned. But greater account should be taken of the core mission of the Court to protect a vulnerable minority, of comparative sexual minority jurisprudence from other human rights courts, including the Inter-American Court of Human Rights and ECJ, of signs of liberalism[211] even within those Eastern states most opposed to rights of sexual minorities,[212] and of global trends. Such considerations should prompt the Court, it is concluded, to rely even on a weak or trend-based consensus in the case of formalisations of same-sex unions, including especially marriage, to seek to prompt reforms in this context without regard to policy considerations. If Strasbourg were to create at least some replication of its robust stance on harassment, intimidation or silencing of sexual minorities, in its jurisprudence on same-sex unions, it would provide a stronger counterweight to the nationalistic, populist resurgence in a number of "Eastern" states and to Russia's "current crusade" against such minorities.[213]

[210] See fn.165 above.

[211] That includes the current struggles of LGBT activists in Member States hostile to sexual minorities, as in e.g. *Fedotova and Shipitko v Russia* (App. No.40792/10), communicated on 2 May 2016. See further, e.g. L. Hodson, "Activists and Lawyers in the ECtHR: The Struggle for Gay Rights", in D. Anagnostou (ed.), *Rights in Pursuit of Social Change: Legal Mobilisation in the Multi-level European System* (Oxford: Bloomsbury, 2014).

[212] See fn.22 above.

[213] The term was used by Amnesty: "Former Soviet states entrenching homophobia and demoralizing LGBTI rights activists" (22 December 2017), *https://www.amnesty.org/en/latest/news/2017/12/former-soviet-states-entrenching-homophobia-and-demoralizing-lgbti-rights-activists/* [Accessed 23 May 2019].